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United States 1607
Circuit Court of Appeals
1607
For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

JOHN J. FULTON CO., a Corporation, Claimant of 48
Bottles, More or Less, of an Article of Drugs Labeled
in Part "FULTON'S COMPOUND RX 1," and
24 Bottles, More or Less, of an Article of Drugs
Labeled in Part "FULTON'S COMPOUND RX 2,"
Shipped by the JOHN J. FULTON COMPANY,
Appellee.

Apostles on Appeal.

Upon Appeal from the United States District Court
for the Western District of Washington,
Northern Division.

FILED

FEB 23 1929

PAUL P. O'BRIEN,
CLERK

United States
Circuit Court of Appeals
For the Ninth Circuit.

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Appellant,

vs.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL.

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310 Federal Building, Seattle, Washington.

HAMLET P. DODD, Esquire, Proctor for Appellant,

310 Federal Building, Seattle, Washington.

A. P. BLACK, Esquire, Messrs. HOWE & GRAHAM, Proctors for Appellee,

856 Stuart Building, Seattle, Washington.

[1*]

District Court of the United States, Western District of Washington, Northern Division.

No. 12516.

UNITED STATES OF AMERICA,

Libellant,

vs.

48 BOTTLES, More or Less, of an Article of Drugs Labeled, in Part, "FULTON'S COMPOUND RX 1" and 24 BOTTLES, More or Less, of an Article of Drugs Labeled in Part "FULTON'S COMPOUND RX 2," Shipped by the JOHN J. FULTON COMPANY.

*Page-number appearing at the foot of page of original certified Apostles on Appeals.

LIBEL OF INFORMATION.

To the Honorable Court Above Named:

The United States of America, by Anthony Savage, United States Attorney, for the Western District of Washington, respectfully shows:

I.

That libellant above named in its own right prays for the seizure and condemnation of certain articles which may be used either as a food or as a drug, to wit:

48 BOTTLES, more or less, of an article of drugs labeled in part

“FULTON’S COMPOUND RX 1,” and

“24 BOTTLES, more or less, of an article of drugs labeled in part, “FULTON’S COMPOUND RX 2.”

II.

That said libellant is informed and believes, and therefore alleges, that the said 48 BOTTLES, more or less, of an article of drugs labeled in part, “FULTON’S COMPOUND RX 1,” and 24 BOTTLES, more or less, of an article of drugs labeled in part, “FULTON’S COMPOUND RX 2,” hereinabove described, have been shipped from San Francisco, in the State of California, to Seattle, in the State of Washington, via Pacific Steamship Company, arriving at Seattle on or about July 2d, 1928, in interstate commerce via said Pacific Steamship Company, [2] which said shipment is now in the same condition in which it was shipped from San

Francisco, in the State of California, to Seattle, in the Northern Division of the Western District of Washington, and has always remained since said shipment in the same condition in which it is now.

III.

That libellant is informed and believes, and upon such information and belief alleges, that the said 48 Bottles, more or less, of an article of drugs labeled, in part "Fulton's Compound Rx 1," and 24 Bottles, more or less, of an article of drugs labeled in part "Fulton's Compound Rx 2," shipped by John Fulton Company, above described, are misbranded, in violation of the Food and Drugs Act, Paragraph Third, as Amended, in the case of drugs, of Section 8, in that the following statements regarding the curative and therapeutic effect of the articles:

"Fulton's Compound Rx 1—(Bottle label):"

* * * We have received many letters from Physicians reporting in cases * * * of * * * Bright's Disease * * * Albuminuria * * * Nephritis, that the use of this Compound was attended with decrease in the Albumen in the urine, or improvement in the physical condition of the patient, or both. * * * If stomach is weak take half doses until tone of stomach is improved. * * * Write for free copy of the RENAL DIGEST presenting epitomes of many Professional reports * * * ."

(Wrapper) * * * We have received many letters from Physicians reporting in cases

* * * of * * * Bright's Disease * * *
 Albuminuria, * * * Nephritis, that the use
 of this Compound was attended with decrease
 in the albumen in the urine, or improvement
 in the physical condition of the patient, or
 both. * * * "

(Circular) * * * We have received
 many letters from Physicians reporting in cases
 * * * of * * * Bright's Disease * * *
 Albuminaria and * * * Nephritis, that the
 use of this Compound was attended with de-
 crease in Albumen in the urine, or improve-
 ment in the physical condition of the patient,
 or both. We mailed copies of the RENAL
 DIGEST containing epitomes of several hun-
 dred of these reports, with ingredients and
 Rationale, to the Physicians of the United
 States and will mail copies upon application to
 all interested. * * * Where the heart is
 involved or there is dropsy and the patient is
 on helpful heart treatment, elimination or
 tonics it is common practice to advise continu-
 ance of same with the Compound until no
 longer necessary. * * * The late Dr. P.
 ———, of California, who had important ex-
 periences with this treatment, stated he relied
 almost solely on the compound and appropriate
 diet. Another very successful Physician aided
 it by prescribing for the most troublesome symp-
 toms. Both reported good results. * * *
 But from a large mass of correspondence it
 seems probable that a great majority of the

cases were simply on the Compound and diet.
[3]

Patience is necessary for many professional reports do not begin to record decreasing albumen until after the tenth to fifteenth days, the physical improvement gradually following. Occasionally this is reversed, some reports recording physical improvement before the albumen shows much response. Hence as above stated, patience is necessary. Directions. Mild cases * * * More Advanced Cases * * * Advanced or Extreme Cases * * * If stomach is too weak take half doses in a little hot water till full dose can be taken. * * * Test for Albumen Simply formula for making quantitative tests *tests* for albumen, so the changes may be compared, will be mailed free on application. John J. Fulton Co., 88 First St., San Francisco, Cal."

Fulton's Compound Rx2—(Bottle Label):

" * * * We have received many letters from physicians reporting in cases designated therein as DIABETES that the use of this Compound was attended with decrease in the sugar in the urine, or improvement in the physical condition of the patient, or both. * * * If stomach is weak, take half doses until tone of stomach is improved. Write for free copy of the DIABETIC DIGEST presenting epitomes of many Professional reports on the results following the use of this Compound."

(Wrapper): “ * * * We have received many letters from Physicians reporting in cases designated therein as Diabetes that the use of this Compound was attended with decrease in the sugar in the urine, or improvement in the physical condition of the patient, or both.”

(Circular): “ * * * We have received many letters from Physicians reporting in cases designated therein as DIABETES that the use of this Compound was attended with a decrease in the sugar in the urine, or improvement in the physical condition of the patient, or both. We mailed copies of the DIABETIC DIGEST recapitulating and summarizing several hundred of these reports, with ingredients and Rationale, to the Physicians of the United States and will mail copies upon application to all interested. If you desire a copy, send your address. * * * The late Dr. P. ———, of California, who had important experience with the treatment, stated he relied almost solely on the compound and appropriate diet. Another very successful Physician aided it by prescribing for painful or troublesome symptoms. Both reported good results. * * * But from a large mass of correspondence it seems probable that a great majority of the cases were simply on the Compound and Diet. * * * Patience is necessary, for many professional reports do not begin to record decreasing sugar until after the tenth to fifteenth day, the physical improvement gradually fol-

lowing. Occasionally this is reversed, some reports recording physical improvement before the sugar shows much response. Hence, as above stated, patience is necessary. * * *

Mild Cases * * * More Advanced Cases

* * * Advanced or Extreme Cases * * *

and with same will include instructions for making sugar tests so the changes may be compared. * * * ,,

are false and fraudulent since the article contains no ingredient or combination of ingredients capable of producing the effects claimed. [4]

IV.

That the said 48 Bottles, more or less of an article of drugs, labeled, in part, "Fulton's Compound Rx 1" and 24 Bottles, more or less, of an article of drugs labeled in part "Fulton's Compound Rx 2," shipped by the John J. Fulton Company, hereinabove described, constitutes an interstate shipment from the State of California, in interstate commerce, as above set forth, and that the said 48 Bottles, etc., and the said 24 Bottles, etc., as hereinabove described, are now within the jurisdiction of this Honorable Court in the original unbroken packages.

V.

That the source of the libellant's information is an official communication by letter, received from the department of Agriculture, Washington, D. C., under date of July 26th, 1928, which said communication is hereto attached by copy marked Ex-

hibit "AA," and made a part of this libel as though set forth herein. [5]

WHEREFORE, in consideration of the premises, your libellant prays that said article, which may be used either as a food or as a drug, consisting of 48 Bottles, more or less, etc., and 24 Bottles, more or less, of Fulton's Compound, as hereinabove described, may be proceeded against and seized for condemnation in accordance with the Act of Congress approved June 30, 1906, and to this end this Honorable Court may issue process of attachment in due form, according to the course of this Honorable Court in cases of admiralty and maritime jurisdiction, so far as practicable in this case, and that all persons, firms, and corporations having or pretending to have any right, title, or, claim in and to said shipment of drugs above mentioned, may be cited to appear herein and answer all and singular the premises aforesaid, and that if the said persons, firms, or corporations cannot be found, they may be cited to appear by process of publication in the manner provided by law.

That by an appropriate order, this Honorable Court may adjudge and decree that the said articles of food and drugs hereinbefore particularly described and mentioned, be condemned at the suit of this libellant, according to the provisions of the Act of Congress hereinbefore set forth; that this Honorable Court may pass all such orders and decrees and judgments as may be necessary in the premises, and may grant your libellant a decree for the cost of this proceeding against the owners or

holders of said articles condemned, should such costs not be justified out of the proceeds of the sale, and that your libellant may have such other and further relief as the nature of the case may require.

ANTHONY SAVAGE.

ANTHONY SAVAGE,

United States Attorney.

DAVID SPAUDLING,

DAVID SPAULDING,

DAVID L. SPAULDING,

Assistant United States Attorney. [6]

United States of America,
Western District of Washington,
Northern Division,—ss.

E. A. Gray, being first duly sworn, on his oath deposes and says: That he is an inspector of the Bureau of Food, Drug and Insecticide Administration, United States Department of Agriculture, at Seattle, Washington; that he has read the foregoing libel, knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which are therein stated on information and belief, and that as to those matters he believes them to be true.

E. A. GRAY.

Subscribed and sworn to before me this 1st day of August, 1928.

[Seal]

S. COOK.

Deputy Clerk, U. S. District Court, Western District of Washington. [7]

EXHIBIT "A."

DEPARTMENT OF AGRICULTURE,

Washington, D. C.

In reply refer to

F. & D. No. 22928.

Jul. 26, 1928.

Hon. Anthony Savage,

United States Attorney,

Seattle, Washington.

Sir: There are at Seattle, in the possession of Stewart & Holmes Drug Company, 48 bottles, more or less, of an article of drugs labeled in part, "Fulton's Compound Rx 1" and 24 bottles, more or less, of an article of drugs labeled in part "Fulton's Compound Rx 2," shipped by the John J. Fulton Company from San Francisco, California, on or about July 2, 1928, via the Pacific Steamship Company.

Analyses of samples of these articles show that they consist essentially of sodium and calcium borate, nitrate and sulphate, extracts of plant drugs including licorice uva ursi and a laxative drug, salicylic acid, alcohol (8%) and water (90%).

Each of the articles is misbranded in violation of the Food and Drugs Act, paragraph third, as amended, in the case of drugs, of Section 8, in that the following statements regarding the curative and therapeutic effect of the article are false and fraudulent, since the articles contain no ingredi-

ent or combination of ingredients capable of producing the effects claimed:

Fulton's Compound Rx 2—(Bottle label):

“ * * * We have received many letters from physicians reporting in cases designated therein as DIABETES that the use of this Compound was attended with decrease in the sugar in the urine, or improvement in the physical condition of the patient, or both. * * * If stomach is weak, take half dose until tone of stomach is improved. Write for free copy of the DIABETIC DIGEST presenting epitomes of many professional reports on the results following the use of this Compound.”

(Wrapper): “ * * * We have received many letters from Physicians reporting in cases designated therein as Diabetes that the use of this Compound was attended with decrease in the sugar in the urine, or improvement in the physical condition of the patient, or both.”

(Circular): “ * * * We have received many letters from Physicians reporting in cases designated therein as DIABETES, that the use of this Compound was attended with a decrease in the sugar in the urine, or improvement in the physical condition of the patient, or both. We mailed copies of the DIABETIC DIGEST recapitulating and summarizing several hundred of these reports, with ingredients and Rationale, to the Physicians of the United States and will mail copies upon application to all interested. If you desire a copy, [8] send your address. * * * The late Dr. P. ———

of California, who had important experience with the treatment, stated he relied almost solely on the compound and appropriate diet. Another very successful Physician aided it by prescribing for painful or troublesome symptoms. Both reported good results. * * * But from a large mass of correspondence it seems probable that a great majority of the cases were simply on the Compound and Diet. * * * Patience is necessary, for many professional reports do not begin to record decreasing sugar until after the tenth to fifteenth day, the physical improvement gradually following. Occasionally this is reversed, some reports recording physical improvement before the sugar shows much response. Hence, as above stated, patience is necessary. * * * Mild Cases * * * More Advanced Cases * * * Advanced or Extreme Cases * * * and with same will include instructions for making sugar tests so that changes may be compared. * * * ”

FULTON'S Compound Rx 1—(Bottle label):

“* * * We have received many letters from physicians reporting in cases * * * of * * * Bright's Disease * * * Albuminuria * * * Nephritis, that the use of this Compound was attended with decrease in the albumen in the urine, or improvement in the physical condition of the patient, or both. * * * If stomach is weak take half doses until tone of stomach is improved * * * Write for free copy of the RENAL DIGEST presenting epitomes of many professional reports * * * .”

(Wrapper) “* * * We have received many letters from physicians reporting in cases * * * of * * * Bright’s Disease * * * Albuminuria, * * * Nephritis, that the use of this Compound was attended with decrease in the albumen in the urine, or improvement in the physical condition of the patient, or both * * * .”

(Circular) “* * * We have received many letters from physicians reporting in cases * * * of * * * Bright’s Disease * * * Albuminuria and * * * Nephritis, that the use of this Compound was attended with decrease in Albumen in the urine, or improvement in the physical condition of the patient, or both. We mailed copies of the RENAL DIGEST containing epitomes of several hundred of these reports, with ingredients and Rationale, to the physicians of the United States and will mail copies upon application to all interested * * * Where the heart is involved or there is dropsy and the patient is on helpful heart treatment, elimination or tonics it is common practice to advise continuance of same with the Compound until no longer necessary. * * * The late Dr. P. ——— of California who had important experiences with this treatment, stated he relied almost solely on the compound and appropriate diet. Another very successful physician aided it by prescribing for the most troublesome symptoms. Both reported good results. * * * But from a large mass of correspondence it seems probable that a great majority of the cases were simply on the Compound and diet.

Patience is necessary for many professional reports do not begin to record decreasing albumen until after the tenth to fifteenth days, the physical improvement gradually following. Occasionally this is reversed, some reports recording physical improvement before the albumen shows much response. Hence as above stated, patience is necessary. Directions. Mild Cases * * * More Advanced [9] Cases * * * Advanced or Extreme Cases * * * If stomach is too weak take half doses in a little hot water till full dose can be taken. * * * Test For Albumen Simple formula for making quantitative tests for albumen, so the changes may be compared, will be mailed free on application. John J. Fulton Co., 88 First St., San Francisco, Cal."

This consignment is subject to seizure and confiscation under section 10 of the Act. The Department requests its immediate seizure. Please wire the action taken.

Very truly yours,
(Sgd.) C. V. MARVIN,
Acting Secretary.

[Endorsed]: Filed Aug. 1, 1928. [10]

[Title of Court and Cause.]

CLAIM.

To the Honorable JEREMIAH NETERER, Judge
of the District Court of the United States, for
said District:

Comes now Donald G. Graham and respectfully states and represents that he is one of the proctors for John J. Fulton Co., a corporation, duly created and existing under and by virtue of the laws of the State of ———; that the said corporation is the consignor of the bottles referred to in the libel heretofore filed in the above-entitled proceeding, and is the agent for Stewart & Holmes Drug Company of Seattle, the owner of said bottles, and is duly authorized to make this claim for and on behalf of said Stewart & Holmes Drug Company of Seattle; that said Stewart & Holmes Drug Company, by and through its duly authorized agent, John J. Fulton Co., a corporation, claims the said property as owner thereof, and prays that the same may be delivered to said John J. Fulton Co., for said owner.

That this claim is made by the proctor for said John J. Fulton Co., for the reason that there is no officer or agent of said John J. Fulton Co., now present in the Western District of Washington, or in the State of Washington.

DONALD G. GRAHAM,

For John J. Fulton Co. [11]

Western District of Washington,
State of Washington,
County of King,—ss.

Donald G. Graham, being first duly sworn on oath, deposes and says: That the facts stated in the foregoing claim are true to the best of his knowledge, information and belief.

DONALD G. GRAHAM.

Subscribed and sworn to before me this 6th day of September, 1928.

[Seal]

EMORY E. HESS,

Notary Public in and for the State of Washington,
Residing at Seattle.

Received a copy of the within claim this 6 day of Sept., 1928.

ANTHONY SAVAGE,

Attorney for Libellant.

[Endorsed]: Filed Sep. 7, 1928. [12]

[Title of Court and Cause.]

**MOTION FOR ORDER ALLOWING WITH-
DRAWAL OF ANSWER.**

Comes now John J. Fulton Co., intervenor herein, and respectfully moves the Court for an order allowing the withdrawal of the answer heretofore filed on August 28, 1928, by said John J. Fulton Co., said withdrawal for the purpose of filing claim and exceptions on behalf of said John J. Fulton Co.

A. P. BLACK,

DONALD G. GRAHAM,

Proctors for John J. Fulton Co.

Received a copy of the within motion this 6 day of Sept., 1928.

ANTHONY SAVAGE,

Attorney for Libellant.

[Endorsed]: Filed Sep. 7, 1928. [13]

[Title of Court and Cause.]

ORDER ALLOWING WITHDRAWAL OF ANSWER.

Upon motion of Donald G. Graham, proctor for John J. Fulton Co., intervenor and claimant, it appearing that the answer heretofore filed by John J. Fulton Co. was filed inadvertently and that said John J. Fulton Co., desires to file exceptions to the libel, now, therefore,

IT IS HEREBY ORDERED that the answer heretofore filed in the above-entitled proceeding may be withdrawn by John J. Fulton Co., and the Clerk of the above-entitled court is hereby authorized to deliver said answer to the proctors for said claimant, said withdrawal for the purpose of filing claim and exceptions to the libel.

Done in open court this 7 day of September, 1928.

JEREMIAH NETERER,
Judge.

O. K.—D. SPAULDING,
Asst. U. S. Attorney.

[Endorsed]: Filed Sep. 7, 1928. [14]

[Title of Court and Cause.]

EXCEPTIONS TO LIBEL.

To the Honorable JEREMIAH NETERER, Judge
of the District Court of the United States, in
and for said District:

John J. Fulton Co., claimant herein, excepts to the libel heretofore filed in the above-entitled proceeding, on the ground that said libel fails to state facts sufficient to constitute a cause of action, and does not disclose any valid claim or lien upon the property referred to in said libel, in all which particulars the said libel is imperfect and insufficient, and claimant prays that said libel may be dismissed.

A. P. BLACK,
DONALD G. GRAHAM,
Proctor for Claimant.

Received a copy of the within exceptions this 6 day of Sept., 1928.

ANTHONY SAVAGE,
Attorney for Libellant.

[Endorsed]: Filed Sep. 7, 1928. [15]

[Title of Court and Cause.]

HEARING ON EXCEPTIONS TO LIBEL.

Now, on this 10th day of September, 1928, this cause comes on for hearing on exceptions to libel and the same are sustained.

Journal No. 16, at page 279. [16]

[Title of Court and Cause.]

ORDER SUSTAINING EXCEPTIONS TO
LIBEL.

The above-entitled proceeding coming on to be heard on the 10th day of September, 1928, on the exceptions filed to the libel by John J. Fulton Co., and argument being had upon said exceptions,

IT IS HEREBY ORDERED, that the exceptions of John J. Fulton Co., intervenor and claimant herein, to the libel be, and the same are hereby sustained, on the ground and for the reason that the allegations of said libel do not constitute misbranding under the Food and Drugs Act, to all of which libelant excepts and its exceptions are allowed.

Libelant is granted 7 days to amend.

Done in open court this 10 day of September, 1928.

JEREMIAH NETERER,
Judge.

O. K.—D. SPAULDING,
Asst. U. S. Attorney.

[Endorsed]: Filed Sep. 10, 1929. [17]

[Title of Court and Cause.]

PETITION FOR REHEARING ON EXCEP-
TIONS TO LIBEL.

Comes now the United States of America, by

Anthony Savage, United States Attorney for the Western District of Washington, and David Spaulding, Assistant United States Attorney for said District, and respectfully petitions the Court to grant a rehearing in the above-entitled matter on the following grounds: That the Court erred in sustaining claimant's exceptions to the libel filed in the above-entitled proceedings.

I.

That the following cases were not called to the attention of the Court and, therefore, a proper consideration of the matter was not had at the time of the hearing—

United States vs. 95 Barrels of Vinegar, 265 U. S. 438, wherein the Supreme Court of the United States in dealing with a case of misbranding under the Federal Food and Drugs Act said: [18]

The statute is plain and direct. Its comprehensive terms contain every statement, design and device which may mislead or deceive. Deception may result from the use of statements not technically false or which may be literally true. The aim of the statute is to prevent that resulting from indirection and ambiguity; as well as from statements which are false. It is not difficult to choose statements, designs and devices which will not deceive. Those which are ambiguous and liable to mislead should be read favorably

to the accomplishment of the purpose of the Act. Citing U. S. vs. Schider, 246 U. S. 519, 522; U. S. vs. Lexington Milling Company, 232 U. S. 399, 409; U. S. vs. Antikamnia Company, 231 U. S. 654, 665. (Underscoring supplied.)

If it is the aim of the statute to prevent impressions resulting from indirection and ambiguity, it may be conservatively said that the statements in question in the instant case are clearly within the statute.

In *Washington Post Company vs. Chaloner*, 250 U. S. 290, the Supreme Court had before it for consideration the question as to the libelous character of a publication in a newspaper. The language of the publication was susceptible of two interpretations, one harmless and the other actionable. The trial Court had instructed the jury that the language was actionable *per se* and the question before the Supreme Court was the correctness of this instruction. The Court approved the rule previously declared by the Circuit Court of Appeals, 6th Circuit, through Judge Lurton (afterwards Mr. Justice Lurton of the Supreme Court), in *Commercial Publishing Company vs. Smith*, 149 Fed. 704, 706, 707:

A publication claimed to be defamatory must be read and construed in the sense in which the readers to whom it is addressed would ordinarily understand it. So the whole item including display lines should be read and construed together, and its meaning and signification thus determined. When thus read if its

meaning is so unambiguous as to reasonably bear but one interpretation, it is for the Judge to say whether that signification is defamatory or not. If, on the other hand, it is capable of two meanings, one of which would be libelous and actionable and the other not, it is for [19] the jury to say, under all the circumstances surrounding its publication, including extrinsic facts admissible in evidence, which of the two meanings would be attributed to it by those to whom it is addressed or by whom it may be read. Citing *Peck vs. Tribune Company*, 214 U. S. 185, 190.

In *Baker vs. Warner*, 231 U. S. 588, 594, the rule is stated as follows:

Where the words are libelous *per se* the Judge can so instruct the jury leaving to them only the determination of the amount of damages. Where the words are not libelous *per se* and, in the light of the intrinsic facts averred could not possibly be construed to have a defamatory meaning, the Judge can dismiss the declaration on demurrer, or, during the trial, may withdraw the case from the jury. But there is a middle ground where though the words are not libelous *per se*, yet, in the light of the intrinsic facts averred, they are susceptible of being construed as having a defamatory meaning. Whether they have such import is a question of fact.

The rule has been followed in the recent cases of *E. I. Du Pont De Nemours & Company vs. Nash-*

ville Banner Publishing Company (C. C. A. 6th Circuit), 12 Fed. (2d) 231; Du Pont Engineering Company vs. Nashville Banner Publishing Company (D. C. M. D. Tenn.), 13 Fed. (2d) 186, and Kraft vs. New York Herald Company (D. C. S. D. N. Y.) 6 Fed. (2d) 644.

Reason and logic prompt the assertion that the rule applied in the foregoing libel cases should be followed in determining what does or does not constitute a therapeutic claim on a drug label, and it should have been left to a jury to determine the meaning of the label and wrapper in question.

A case very closely in point to the instant case is Bradley vs. United States (C. C. A. 6th Circuit), 264 Fed. 79. In that case Bradley had been shipping in interstate commerce a preparation bearing the following statements on the label: "Recommended in the treatment of Bright's disease, Diabetes, Dropsy, [20] Cystitis, Gout, Rheumatism, Indigestion, Kidney and Bladder trouble," etc., "directions * * * ." A consignment of the product was seized by process of libel, charging that the aforesaid statements on the label were false and fraudulent. Bradley intervened as claimant and excepted to the libel:

(1) That the libel does not disclose that the waters contained in the bottles are misbranded because the label does not claim that the waters contained any ingredients or substances for the cure for any human ailment.

(2) The label described in the libel does not

pretend that the waters contain medical agents effective as a remedy for human disease.

(3) That the labels set out in the libel do not amount in law to a misbranding.

The exceptions were overruled and the cause went to trial before a jury who returned a verdict in favor of the Government, upon which a judgment was entered condemning the product. The errors assigned in the Circuit Court of Appeals were as follows:

(1) The Court erred in failing to sustain exceptions to the libel.

(2) The Court erred in refusing to instruct the jury to find a verdict for the claimant.

(3) The Court erred in refusing the charge that the label on the bottles of water did not violate the Act of Congress, in that the said label made no statement regarding the therapeutic or curative effect of such waters.

(4) The Court erred in refusing to grant a new trial.

Concerning these assignments of error, the Circuit Court of Appeals for the 5th Circuit said:

(1) The first and third assignments raise the same question of law: Does the label as set out in the libel bear the interpretation sought to be placed on it by the Government; i. e., that the words, "Recommended in the treatment of" the diseases named, properly construed, mean that the said water had a curative or therapeutic quality? If the Court could say that they did not have this meaning, then it should

have sustained the exceptions and given the charge asked. If it could not, then no [21] error was committed in overruling the exception and refusing to give the charge. The construction of the language used in the label was in the first instance for the Court; the falsity or truth and the intent of the claimant were for the jury to find from the testimony before it.

(2) It seems to us that words, "Recommended in the treatment of Bright's disease," etc., "Directions * * *"—could only mean that the use of the water in the treatment of the diseases named would effect a cure or alleviation of such diseases; otherwise, why recommend it? Unless this means that the water did contain elements or ingredients which would alleviate or cure the diseases named, when taken according to the directions thereon contained, it was a waste of printer's ink. Would not anyone suffering from any one of the diseases named understand that by the taking of the water his ailment would be alleviated or cured by reason of the ingredients contained in the water? It seems to us that he would. Treatment would only be taken with a view to alleviation or cure, and a water possessing elements or ingredients favorable to that end only would be recommended.

We think this label clearly susceptible of this construction, and that no error was committed, either in overruling the exception or refusing the charge.

It is true that the use of the words "Recommended in the treatment of Bright's disease," etc., "Directions * * * " is more of a literal therapeutic claim than a statement on the labels that the manufacturer has received letters from doctors to the effect that they have used the preparation successfully in the treatment of disease. The latter form, however, is merely another way of saying that the product is recommended in the treatment of the named diseases. It is merely an application of the truism spoken by Mr. Justice Butler in *U. S. vs. 95 Barrels Vinegar, supra*: "Deception may result from the use of statements not technically false or which may be literally true," and as further said by Judge Call in the Bradley case, unless the statement means that the [22] preparation is effective in the mitigation or cure of the diseases named when taken according to directions thereon contained, it is a waste of printer's ink. The manufacturer could have had no other purpose in putting such a statement on his labels, and one suffering from one of the diseases named would derive no other meaning from the context.

Respectfully submitted,

ANTHONY SAVAGE,

United States Attorney.

DAVID SPAULDING,

Assistant United States Attorney.

Received copy of within petition this 5th day of Oct., 1928.

HOWE & GRAHAM,
Attorneys for Respondent.

[Endorsed]: Filed Oct. 5, 1928. [23]

[Title of Court and Cause.]

DECISION DENYING PETITION FOR
REHEARING ON EXCEPTIONS TO
LIBEL.

Anthony Savage, Esq., U. S. District Attorney,
David Spaulding, Esq., Asst. U. S. Dist. Atty.,
Proctors for Libelant.

A. P. Black, Esq., Howe & Graham, Proctors for
Respondent.

NETERER, District Judge.—The petition for
rehearing is denied.

NETERER,
U. S. District Judge.

[Endorsed]: Filed Oct. 29, 1928. [24]

[Title of Court and Cause.]

ORDER OF DISMISSAL.

Upon motion of claimant herein, it appearing that the exceptions to the libel of information have heretofore been sustained and the time having expired for libelant to file an amended libel,

IT IS HEREBY ORDERED that the libel of information be, and it is hereby dismissed, and the United States Marshal is hereby ordered and directed to deliver to the claimant herein the articles heretofore seized and embraced within said libel of information.

Done in open court this 7th day of November, 1928.

JEREMIAH NETERER,

Judge.

O. K. as to form.

D. SPAULDING,
Asst. U. S. Attorney.

Exception noted and allowed.

[Endorsed]: Filed Nov. 7, 1928. [25]

[Title of Court and Cause.]

NOTICE OF APPEAL.

To John J. Fulton Co., Claimant, and A. P. Black,
and Howe & Graham, Proctors for Claimant:

You, and each of you, will please take notice that the United States of America, libelant in the above-entitled cause, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the order sustaining exceptions to libel, and order of dismissal made, entered and filed on the tenth

day of October and the seventh day of November, 1928, respectively.

ANTHONY SAVAGE,
United States Attorney.
HAMLET P. DODD,
Assistant United States Attorney.

Received copy of within notice this 17 day of Jan., 1929.

HOWE & GRAHAM,
Attorneys for Respondent Claimant.

[Endorsed]: Filed Jan. 21, 1929. [26]

[Title of Court and Cause.]

PETITION FOR APPEAL.

The above-named libelant, feeling itself aggrieved by the order of dismissal, order sustaining exceptions, and order overruling motion for rehearing, entered on October 10, and November 7, 1928, respectively, does hereby appeal from the said orders and each and every part thereof, to the Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors herein, and said libelant prays that its appeal be allowed and citation be issued as provided by law, and that a transcript of the record, proceedings and papers upon which said orders were based, duly authenticated, be sent to the United States Circuit Court

of Appeals for the Ninth Circuit, as by the rules of said court in such cases made and provided.

ANTHONY SAVAGE,

United States Attorney.

HAMLET P. DODD,

Assistant United States Attorney.

[Endorsed]: Filed Jan. 21, 1929. [27]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Comes now the United States of America, libelant, in the above-entitled action, by its proctors, Anthony Savage, United States Attorney for the Western District of Washington, and Hamlet P. Dodd, Assistant United States Attorney for the same District, Northern Division, and says that in the records and proceedings in said cause in the order sustaining exceptions to libel, and order of dismissal entered therein, there is manifest error in the following particulars:

I.

The Court erred in this: In signing an order sustaining exceptions to the libel; to which libelant took exception at the time.

II.

The Court erred in this: In signing an order denying a petition for rehearing on exceptions to [28] the libel; to which libelant took exceptions at the time.

III.

The Court erred in this: In signing an order of dismissal of said libel in said cause; to which libelant took exception at the time.

ANTHONY SAVAGE,
United States Attorney.

HAMLET P. DODD,
Assistant United States Attorney.

Received copy of within assign. this 17th day of
Jan., 1929.

HOWE & GRAHAM,
Attorneys for Claimant.

[Endorsed]: Filed Jan. 21, 1929. [29]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

On the application of the libelant herein, IT IS HEREBY ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the order of dismissal hereto entered and filed on the 7th day of November, 1928, be, and the same is hereby allowed.

IT IS FURTHER ORDERED that an apostle on appeal of the record, testimony, stipulations and all proceedings be forthwith transmitted to said United States Circuit Court of Appeals for the Ninth Circuit.

Done in open court this 21 day of January, 1929.

JEREMIAH NETERER,
United States District Judge.

Received copy of within order this 17th day of
Jan., 1929.

HOWE & GRAHAM,
Attorneys for Claimant.

[Endorsed]: Filed Jan. 21, 1929. [30]

[Title of Court and Cause.]

PRAECIPE FOR APOSTLES ON APPEAL.

To the Clerk of the Above-entitled Court:

You will please prepare apostles on appeal of
the above-entitled action to contain the following:

Libel of information.

Claim.

Motion to withdraw answer.

Exceptions to libel.

Order withdrawing answer.

Record of the hearing on the exceptions to libel.

Order sustaining exceptions.

Petition for rehearing on exceptions.

Memorandum of the Court's decision on the peti-
tion for rehearing.

Order of dismissal.

Petition for appeal.

Assignments of error.

Order allowing appeal.

Citation on appeal.

Notice of appeal.

Praecipe.

Clerk's certificate to transcript of record.

HAMLET P. DODD,
Asst. United States Atty.

[Endorsed]: Filed Jan. 21, 1929. [31]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO APOSTLES ON APPEAL.

United States of America,
Western District of Washington,—ss.

I, Ed. M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 31, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the apostles on appeal herein, in the above-entitled cause, from the judgment of said United States District Court for the Western District of Washington, to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees

and charges incurred in my office by or on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [32]

Clerk's fees (Act Feb. 11, 1925) for making record, certificate or return, 67 folios, at 15¢	\$10.05
Certificate of Clerk to Apostles on Appeal, with seal50
<hr/>	
Total	\$10.55

I hereby certify that the above cost for preparing and certifying record, amounting to \$10.55 will be included as constructive charges against the United States in my quarterly account to the Government of fees and emoluments for the quarter ending March 31, 1929.

I further certify that I hereto attach and herewith transmit the original citation issued in this cause.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 31 day of January, 1929.

[Seal]

ED. M. LAKIN,
Clerk, United States District Court, Western Dis-
trict of Washington.

By S. E. Leitch,
Deputy. [33]

[Title of Court and Cause.]

CITATION ON APPEAL.

United States of America,
Western District of Washington,
Northern Division,—ss.

The President of the United States, to John J.
Fulton Co., Claimant, and A. P. Black, and
Howe & Graham, Proctors for Claimant.

You, and each of you, are hereby cited and admonished to appear in the United States Circuit Court of Appeals to be held at the city of San Francisco, California, in the Ninth Judicial Circuit on the —— day of ———, 1929, pursuant to an order allowing appeal from the final order of dismissal signed and filed on the 7th day of November, 1928, wherein the United States is libellant, and 48 Bottles, more or less, of an article of drugs labeled in part “Fulton’s Compound RX 1,” and 24 Bottles, more or less, of an article of drugs labeled in part “Fulton’s Compound RX 2,” respondent, and John J. [34] Fulton Co., claimant, to show cause, if any there be, why the judgment against the libellant entered herein should not be corrected, and why justice should not be done to the parties in that behalf.

WITNESSETH the Honorable JEREMIAH E. NETERER, United States District Judge for the Western District of Washington, Northern Division, this 21st day of Jan., A. D. 1929.

[Seal]

JEREMIAH NETERER,
United States District Judge.

Received a copy of the within citation this 17th day of Jan., 1929.

HOWE & GRAHAM,
Attorneys for Claimant. [35]

[Endorsed]: Filed Jan. 21, 1929. [36]

[Endorsed]: No. 5709. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. John J. Fulton Co., a Corporation, Claimant of 48 Bottles, More or Less, of an Article of Drugs Labeled in Part "Fulton's Compound RX 1," and 24 Bottles, More or Less, of an Article of Drugs Labeled in Part "Fulton's Compound RX 2," Shipped by the John J. Fulton Company, Appellee. Apostles on Appeal. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed February 4, 1929.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the ²
**United States Circuit Court
of Appeals**
For the Ninth Circuit

No. 5709

UNITED STATES OF AMERICA,

Appellant.

vs.

JOHN J. FULTON CO., a Corporation, Claimant of
48 Bottles, more or less, of an Article of Drugs,
Labeled in part "Fulton's Compound Rx 1," and
24 Bottles, more or less, of an Article of Drugs,
Labeled in part "Fulton's Compound Rx 2," Ship-
ped by the John J. Fulton Company,

Appellee.

UPON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE JEREMIAH NETERER, *Judge*

Brief of Appellant

ANTHONY SAVAGE

United States Attorney.

HAMLET P. DODD

Assistant United States Attorneys

Attorneys for Appellant

Office and Postoffice Address:

310 Federal Building, Seattle, Washington.

FILED

APR 5 - 1929

PAUL P. O'BRIEN,

CLERK

In the
United States Circuit Court
of Appeals
For the Ninth Circuit

No. 5709

UNITED STATES OF AMERICA,

Appellant.

vs.

JOHN J. FULTON CO., a Corporation, Claimant of
48 Bottles, more or less, of an Article of Drugs,
Labeled in part "Fulton's Compound Rx 1," and
24 Bottles, more or less, of an Article of Drugs,
Labeled in part "Fulton's Compound Rx 2," Ship-
ped by the John J. Fulton Company,

Appellee.

UPON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE JEREMIAH NETERER, *Judge*

Brief of Appellant

STATEMENT OF FACTS

This is an appeal from a libel on certain drugs known as Fulton's Compound, to which exceptions to the libel were sustained, certain language being complained of on the bottle label, wrapper, and circular, a

typical quotation from which is the bottle label: "We have received many letters from physicians reporting cases designated therein as DIABETES that the use of this Compound was attended with decrease in the sugar in the urine, or improvement in the physical condition of the patient, or both, * * *." (See Apostles on Appeal, pages 10, 11, 12, 13, and 14, Exhibit A.)

ASSIGNMENTS OF ERROR

Assignments of error were made as to the formal orders entered in the matter, to-wit: in sustaining exceptions to the libel, in denying petition for re-hearing on the exceptions to the libel, and in signing an order for dismissal.

ARGUMENT

In this action, under the Food and Drugs Act, it is merely a question as to whether or not, as in the opinion of the appellant, in this matter a company can do by indirection what it cannot do by direction. The question is whether curative, remedial, or therapeutic claims can be made or set forth on the bottle label, the wrapper, and circular of drugs in which no direct allegation is made by the vendor of the articles as being

the statement of the vendor, but statements can be placed in the mouth of persons undesignated and referred to as physicians or letters from physicians in such language as this :“* * * Where the heart is involved or there is dropsy and the patient is on helpful heart treatment, elimination or tonics it is common practice to advise continuance of same with the Compound until no longer necessary.” Perhaps such language can be construed as to make no direct curative, remedial, and therapeutic claims, but such a construction, in your appellant’s opinion, is a unwarranted, unfair, and biased claim.

Referring to the brief on petition for re-hearing on exceptions of the libel, and re quoting from said brief for purposes of clarity and unity in one brief, these cases were called to the attention of the Court:

United States vs. 95 Barrels of Vinegar, 265 U. S. 438, wherein the Supreme Court of the United States in dealing with a case of misbranding under the Federal Food and Drugs Act, said:

“The statute is plain and direct. Its comprehensive terms contain every statement, design and device which may mislead or deceive. Deception may result from the use of statements not technically false or which may be literally true. *The aim of the statute is to prevent that resulting from indi-*

rection and ambiguity; as well as from statements which are false. It is not difficult to choose statements, designed and devices which will not deceive. Those which are ambiguous and liable to mislead should be read favorably to the accomplishment of the purpose of the Act. Citing *U. S. vs. Schider*, 246 U. S. 519, 522; *U. S. vs. Lexington Milling Company*, 232 U. S. 399, 409; *U. S. vs. Antikamnia Company*, 231 U. S. 654, 665" (Underscoring supplied.)

A case very closely in point to the instant case is *Bradley vs. United States* (C. C. A. 6th Circuit), 264 Fed. 79, (Page 23, Apostles on Appeal, and following). In that case Bradley had been shipping in interstate commerce a preparation bearing the following statements on the label: "Recommended in the treatment of Bright's disease, Diabetes, Dropsy, Cystitis, Gout, Rheumatism, Indigestion, Kidney and Bladder trouble," etc., "directions * * * ." A consignment of the produce was seized by process of liebl, charging that the aforesaid statements on the label were false and fradulent. Bradley intervened as claimant and excepted to the libel:

(1) That the libel does not disclose that the waters contained in the bottles are misbranded because the label does not claim that the waters contained any ingredients or substance for the cure of any human ailment.

(2) The label described in the libel does not pretend that the waters contain medical agents effective as a remedy for human disease.

(3) That the labels set out in the libel do not amount in law to a misbranding.

The exceptions were overruled and the cause went to trial before a jury who returned a verdict in favor of the Government, upon which a judgment was entered condemning the product. The errors assigned in the Circuit Court of Appeals were as follows:

(1) The Court erred in failing to sustain exceptions to the libel.

(2) The Court erred in refusing to instruct the jury to find a verdict for the claimant.

(3) The Court erred in refusing the charge that the label on the bottles of water did not violate the Act of Congress, in that the said label made no statement regarding the therapeutic or curative effect of such waters.

(4) The Court erred in refusing to grant a new trial.

Concerning these assignments of error, the Circuit Court of Appeals for the 5th Circuit said:

(1) The first and third assignments raise the same question of law: Does the label as set out in the libel bear the interpretation sought to be placed on it by the Government; i. e., that the words, "Recommended in the treatment of" the diseases named, properly construed, mean that the said water had a curative or therapeutic quality? If the Court could say that they did not have this meaning, then it should have sustained the exceptions and given the charged asked. If it could not, then no error was committed in overruling the exception and refusing to give the charge. The construction of the language used in the label was in the first instance for the Court; the falsity or truth and the intent of the claimant were for the jury to find from the testimony before it.

(2) It seems to us that words, "Recommended in the treatment of Bright's disease," etc., "Directions * * * ."—could only mean that the use of the water in the treatment of the disease named would effect a cure or alleviation of such diseases; otherwise, why recommend it? Unless this means that the water did contain elements or ingredients which would alleviate or cure the diseases named, when taken according to the directions thereon contained, it was a waste of printer's ink. Would not anyone suffering from any

one of the diseases named understand that by the taking of the water his ailment would be alleviated or cured by reason of the ingredients contained in the water? It seems to us that he would. Treatments would only be taken with a view to alleviation or cure, and a water possessing elements or ingredients favorable to that end only would be recommended.

We think this label clearly susceptible of this construction, and that no error was committed, either in overruling the exception or refusing the charge.

Particularly interesting is the language, "Deception may result from the use of statements not technically false or which may be literally true." (*U. S. vs. 95 Barrels of Vinegar*, 265, U. S. 438.) Such language as has been quoted here, it would seem, clearly falls within that rule. It is true perhaps that the statements on the labels and wrappers, taken literally, do not say in so many words that Fulton's Compound is effective in the mitigation or cure of any disease. They do, however, by innuendo, create that impression more effectively than could be done by any direct statement. To take the position that such language may be read literally only is to lose sight of the purpose of the Food and Drugs Act as it is applied to drugs. Such a ruling

would have the effect of letting down the bars to countless fraudulent patent medicines, the manufacturers of which are constantly attempting to use the facilities of interstate commerce to effectuate greater sale of their products. The cases cited by the appellee, *United States vs. Tuberclecide Co.*, 252 Fed. 938, and *United States vs. Natura Co.*, 250 Fed. 925, can be distinguished and differentiated completely from the situation in point, whereas in our opinion, *Bradley vs. United States*, 264 Fed. (6th Circuit) 79, is in some measure a precedent for the appellant's position in this case.

Further than the basic rights involved herein, the appellant in this cause feels that the Court erred in sustaining exceptions to the libel for the reason that while these words are not actionable *per se*, yet they are in that middle ground where they are susceptible to being construed for having a defamatory meaning, and in such middle ground a jury should be left to determine whether or not the words used constitute a remedial or therapeutic claim on this drug label. It was not within the province of the court, but rather within the province of the jury to settle the claim in this case; *Baker vs. Warner*, 231 U. S. 588, 594, *E. I. Du Pont De Nemours & Company vs. Nashville Ban-*

ner Publishing Company (C. C. A. 6th Circuit), 12 Fed. (2d) 231; *Du Pont Engineering Company vs. Nashville Banner Publishing Company* (D. C. M. D. Tenn.), 13 Fed. (2d) 186, and *Kraft vs. New York Herald Company* (D. C. S. D. N. Y.) 6 Fed. (2d) 644.

For the reasons set forth herein, the appellant feels that the sustaining of the exceptions to the libel was error, and for petitioning for relief.

Respectfully submitted,

ANTHONY SAVAGE

United States Attorney.

HAMLET P. DODD

Assistant United States Attorneys

Attorneys for Appellee

No. 5709

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

VS.

JOHN J. FULTON Co. (a corporation), Claimant of 48 Bottles More or Less, of an Article of Drugs Labeled in Part "Fulton's Compound RX 1," and 24 Bottles, More or Less, of an Article of Drugs Labeled in Part "Fulton's Compound RX 2," Shipped by the John J. Fulton Company,

Appellee.

BRIEF FOR APPELLEE.

A. P. BLACK,

114 Sansome Street, San Francisco, California,

Attorney for Appellee.

HOWE & GRAHAM,

Stuart Building, Seattle, Washington,

Of Counsel.

FILED

MAY 14 1929

PAUL P. O'BRIEN,

CLERK

No. 5709

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

JOHN J. FULTON Co. (a corporation), Claimant of 48 Bottles More or Less, of an Article of Drugs Labeled in Part "Fulton's Compound RX 1," and 24 Bottles, More or Less, of an Article of Drugs Labeled in Part "Fulton's Compound RX 2," Shipped by the John J. Fulton Company,

Appellee.

BRIEF FOR APPELLEE.

That the Court may understand the situation of the respondent in this case, it is proper to make this preliminary statement:

The respondent, after over twenty-five years of experiment and improvement in their preparations, and after having received many thousands of testimonials from private individuals suffering from Bright's Disease and Diabetes, finally resolved to *reach the doctors* of America and convince them against their prejudices that there is a remedy for

those diseases which are *killing off about 150,000 of our people every year.*

To that end, involving several years of time and many thousands of dollars of expense, we addressed and mailed the offer below to the physicians listed in the American Medical Directory, and not only once but from four to five times, aiming to reach every physician in America having Bright's Disease or Diabetes himself or in his family with a practical demonstration of the fact that albumen and symptoms in Bright's Disease and sugar and symptoms in Diabetes (the latter in patients over 45) are reducible by internal treatment, viz.:

“If there is a case of Bright's Disease or Diabetes in your family showing two per cent or more of albumen or sugar, in order to demonstrate that wasting albumen and sugar are being absorbed in Bright's Disease and Diabetes, we will, without charge, put in the express for you, F. O. B. Detroit, one-half dozen (two months' treatment) of the appropriate agent, formulae and rationale herein, expecting in most cases in which there is a reasonable prospect of sixty days of life that this half dozen will reduce the albumen (or sugar) over half, with physical improvement beginning to show. If the usual diet prescribed in these cases is being observed we suggest it be continued without change so there will be no uncertainty in your mind as to the cause of the results.”

We later widened the above offer by proffering a free thirty day demonstration to every physician in America treating a Diabetic patient over 45 years of age. As follows:

“ANNOUNCING INNOCUOUS, INTERNAL TREATMENT
THAT REDUCES SUGAR AND SYMPTOMS IN DIABETES.

If this seems difficult to believe and you are treating a Diabetic over 45 we tender you a free demonstration.

Summary of results in several hundred cases with ingredients and rationale mailed on request. As Diabetic Gangrene is one of the most serious aspects the first dozen reports are held to cases that involved gangrene to show how definitely this symptom also follows sugar assimilation.

Physicians are discontinuing injections at once; capsules discontinued two months after sugar disappears.

Important Diabetic practice is developing in cities and physicians' accounts even in small towns are running over a hundred dollars each.

All inquiries will get the literature but, for obvious reasons, a free demonstration will only follow to those stating they are treating a Diabetic over 45. We expect the demonstration alone to reduce the sugar and symptoms 20% to 40%. Can commence testing for decreasing sugar the second week.

JOHN J. FULTON Co.,
72 First St., San Francisco, Calif.”

In response to the first offer above 762 physicians, representing all schools and societies, asked for and were served with a full 60 day course of the treatment. From these we have had about 740 letters reporting their results, several hundred of which will be found summarized in the printed folders following.

To date something over 1700 physicians have asked for and have been served with the free 30 day demonstrations. From these we have received several hundred letters giving their results.

In a word, to date over 2400 physicians (which number is increasing daily), representing all schools and societies, have asked for and have been served with the free demonstrations and from these physicians we have had something over a thousand letters, overwhelmingly attesting the ability of these agents to reduce albumen and symptoms in Bright's Disease and sugar and symptoms in Diabetes, the flat failures (those reported as producing no benefit whatever) never totalling as much as ten per cent.

And that the epitomes of these reports as printed herewith might have due credence a great majority of the epitomes were compared with the original letters by the late Thos. S. Burnes, Notary Public and Commissioner of Deeds, and the transcriptions were certified by him as correct over his notarial seal, viz.:

“I, Thomas S. Burnes, authorized by the State of California to authenticate documents, have compared figures above and those on the reverse hereof to the double rule with the Physician's reports and urinalyses and certify they are correctly transcribed and that the correspondence shows the physicians are all unknown to affiant and have no interest other than to record and report results.

(Signed)

(Seal)

Thomas S. Burnes,
Notary Public.”

The epitomes shown in Exhibit “A” will now be understood.

There are about 800,000 people in the United States who are suffering from either Bright's Disease or Diabetes.

The medical profession generally state that there *is no known remedy for these diseases.*

“Insulin” is the remedial agent now prescribed but it does not cure; it, at most, gives temporary relief.

In this state of affairs it is not to be wondered at that physicians *who themselves have been sufferers from these diseases* would be willing to try *any* remedy that gave any *hope of relief* to them. It was either *try it or get ready to die.* Hundreds of them did try the preparation and the results have been most gratifying.

Having been benefited themselves, naturally they would wish to bring the same benefits to their patients and the Company is now in receipt of a constant stream of orders and reorders for their patients and there are now on file hundreds and hundreds of letters from these doctors stating the beneficial results to their patients. From these letters the respondent feels justified in putting on its labels the very modest statement complained of by the Department of Agriculture.

Medical science shows a varied history. Beginning in absolute ignorance it has slowly evolved a real science, and in some fields of knowledge deserves the admiration of the world; but alongside of this progress there still remains an astonishing amount of ignorance and stupid prejudice which is highly detrimental to the human race.

Nearly every new discovery in medical science has met with the most violent opposition of the rank and

file of the profession; and many benefactors of the human race have been literally hounded to an early grave through the persecutions set on foot by the "regular schools" of medicine.

The respondent has felt the "forked lightning of the wrath" of this bigotry and prejudice and is still the object of persecution by the "higher ups" of the medical associations, who simply close their eyes to the truth and refuse to see the light.

So strong is this prejudice that the doctors *who have themselves been benefited by the use of respondent's preparations* and *who are benefiting scores of their patients therewith*, are afraid to have their names published for fear of persecutions by the officials of their state and county medical societies.

But the number of physicians who are using the preparations is increasing every week and in course of time if the respondent can be allowed to keep on with its good work, the number of those using them will be so great as to compel the medical societies to recognize the value of the same and to stop trying to hamper and ruin respondent.

This case is one of four that are pending against respondent at the present time. The respective U. S. attorneys at Baltimore, Denver and Salt Lake have very kindly consented to hold all proceedings in abeyance in their districts till this case is finally determined.

There is attached hereto and marked Exhibit "A" a bunch of literature which is sent to doctors all over the country who ask to have a free treatment.

A portion of this is a digest of several hundred reports from physicians who have used, and are now constantly using, respondent's products in their practice.

This brings us to the discussion of the question before the Court, viz.: "Are the labels used by respondent a violation of the Food and Drug Act?"

The particular "misbranding" which is attempted to be charged in the libel is under the third subdivision, which is:

"Third. If its package or label shall bear or contain any statement, design or device regarding the curative or therapeutic effect of such article or any of the ingredients or substances contained therein, WHICH IS FALSE AND FRAUDULENT."

It is charged that on the bottle label, marked "Rx 1," this language is used:

"We have received many letters from physicians reporting in cases * * * of Bright's disease and albuminuria * * * nephritis * * * that the use of this compound was attended with decrease in the albumen in the urine, or improvement in the physical condition of the patient, or both" * * *.

The same wording is charged to be on the "wrapper" and also upon the "circular."

The identical language is then alleged to be on the label, wrapper and circular used on what is termed "Rx 2" in regard to diabetes and decrease in sugar.

Now, we ask, in what way is that statement "*false and fraudulent*"? Does the government set forth

anything at all to show that respondent has *not* received many letters from physicians and that those letters *do not* report that the use of the "compound" is attended with decrease in albumen and sugar as the case may be? We simply state the fact that we *have received the letters* and then state the further fact that *those letters report certain results*.

There is no attempt whatever to negative the truth of those statements. The only basis upon which the government predicates its case is a letter from C. V. Marvin, Acting Secretary of Agriculture, which communication is marked exhibit "A" and made a part of the libel and in which the acting secretary states his conclusion that there is a misbranding because, as he thinks, "the articles contain no ingredient or combination of ingredients capable of producing the effects claimed." (Bottom of p. 10 and top of p. 11, Apostles.)

How can the opinion of the acting secretary that the compound has no therapeutic value negative the fact that respondent has received many letters from physicians which letters state certain results?

Before the government is entitled to seize and destroy the property of respondent the latter must put on its labels something that is in fact "*false and fraudulent*."

The government must be in a position to show that we have not received such letters and that they do not contain the statements alleged.

There is no allegation in the libel which negatives either one of these statements; and until the learned United States Attorney is in a position to prove that

we have no such letters; and that they do not contain the statements alleged, what right has he to ask that we be put to the trouble and expense of a trial at a great distance from home. San Francisco is the home of respondent and if we had to go to Seattle, then to Baltimore, then to Denver and then to Salt Lake to make a separate defense; taking necessary witnesses to these various places; even though we won every case, we would still be the loser by thousands of dollars. And that would not be the end, for the government would still be in a position to make other seizures all over the country and bring financial ruin to respondent while carrying on its losing battle against respondent.

Unless there be some real justification for it, the Courts will not tolerate such a course of intolerable persecution; and, to its credit be it said, the Department of Justice is willing to abide the final decision in this case for the determination of the actions begun in other jurisdictions.

Now for the cases.

U. S. v. 95 Barrels of Vinegar, 265 U. S. 438 is not in point.

That was a case in which the label stated the contents of the bottle to be "Apple Cider Vinegar, made from selected apples," when the fact was the vinegar was made from *dried apples* and not from apple cider.

Of course the statement on the label was false and misleading.

Bradley v. United States, 264 Fed. 79, is relied upon by counsel to sustain government's contention.

That was a mineral water case and the shipper put on his label *his own* recommendation of the water for “*treatment*” of *nine different diseases*.

That label in effect said to the public: “*We recommend this mineral water as a remedy for Bright’s Disease, Diabetes, Dropsy, etc., etc.*”

The Court (p. 81) said:

“It seems to us that words, ‘Recommended in the treatment of Bright’s disease, etc., Directions’ * * * could only mean that the use of the water in the treatment of the diseases named *would effect a cure or alleviation* of such diseases.”

But that is a different situation from the instant case. The Fulton Co. makes no recommendation at all, *and makes no statement as to the therapeutic value of its products*. It states a simple fact that it has received many letters from physicians reporting certain results following the use of its products.

The government cannot question the fact that we have received those letters, nor can it question the fact that those letters contain the statements set out in the labels.

If that be true, then in no sense can the labels be said to contain any statement that is “false and fraudulent.”

Suppose we put upon our labels these words: “We have received one hundred letters from one hundred physicians in the United States who report that they have cured themselves of diabetes by using Fulton’s Compound,” and suppose those letters are all on file in our office and actually contain the statement set

out, would that be a "false and fraudulent" statement on the part of Fulton and Co.? We think not. It is a mere statement of fact—not false—not fraudulent.

The issue here is not the therapeutic value of the Fulton's Compound but whether our labels speak the truth.

The government has tendered no issue upon that point, and until such issue is tendered respondent should be let alone.

Suppose the respondent today receives a letter from a physician, let us call him "Dr. X," in Denver, saying he is suffering from diabetes and would like half a dozen bottles of respondent's compound, and that the bottles are shipped to him from San Francisco. Suppose that six weeks thereafter "Dr. X" writes to the respondent a letter in which he says: "I have used your compound and am glad to say the sugar content of the urine has been reduced from 4% to $\frac{1}{2}$ of 1% and I am feeling greatly improved."

Suppose respondent should put on its label at the time of its next shipment these words:

"We have received a letter from 'Dr. X' of Denver in which he says that the use of our compound in his own case was followed by a reduction of the sugar content in the urine and general improvement in health," would there be anything "false and fraudulent" in that label? How could a statement by the Acting Secretary of Agriculture that in his opinion Fulton's Compound had no therapeutic value raise the issue as to the truth of the fact that the letter was

received and contained the statement set out in the label?

If we were forced to a trial upon the real issue here, we can produce hundreds and hundreds of letters from physicians from all parts of the country attesting in the most unqualified manner the beneficial effects of the use of our products. These letters and reports may be inspected by the U. S. Attorney and the Court if desired, but the names of the physicians should not be published for the simple reason that it would subject them to undue persecutions on the part of certain officials in the medical societies who are still so "tied to their idols" that they will not take the trouble to investigate the matter.

Years ago the respondent offered to make a test case by taking some of its compound into an adjoining state and shipping it to a druggist in San Francisco so the trial could be had here where witnesses can be called at little expense, both laymen and physicians, but the offer was declined.

The learned counsel say in their brief the "words are not actionable *per se*, yet they are in that middle ground * * * and in such middle ground a jury should be left to determine whether or not the words used constitute a remedial or therapeutic claim on this drug label" (p. 8 of brief).

It is respectfully submitted that our great government is too big to be engaged in straining for technical, harsh and unreasonable constructions of its *quasi* criminal statutes.

The fair reading of our label will disclose no violation of the Food and Drug Act. At the most our label declares that many physicians who have *actually tried* our preparations report that certain beneficial results followed. As opposed to that the government claims that some chemist *who has not tried* the preparations reports that there is no therapeutic value to be found therein. The government makes no statement that any physician *who has used and tried the preparations* reports that there is no therapeutic value therein. Even if there were such diversity of opinion among doctors that would not be a "misbranding" because the statement on the label must be both "false and fraudulent," and under the decisions where it is a dispute among doctors the courts will not decide which party is right.

In *M'Lean Medicine Co. v. U. S.*, 253 Fed. page 696, we find this language:

"The testimony of physicians as to their individual opinions of the efficacy of the preparation would have been properly rejected if there had been disclosed *a difference of medical opinion* on the subject, as a conviction could not properly rest upon a claim of fraudulent statements, when they *were based upon mere matters of opinion on such debatable subjects* (italics ours) citing, among others, the case of *School of Magnetic Healing v. McAnnulty*, 187 U. S. 94 (47 L. Ed. 90)."

This latter case contains a beautiful discussion of the whole question of "*opinions*" in medical matters. On page 94 of 47 L. Ed. we find this language:

"There is no exact standard of absolute truth by which to prove the assertion false and a fraud.

We mean by that to say that the claim of complainants cannot be the subject of proof as of an ordinary fact; it cannot be proved as a fact to be a fraud, or false pretense or promise, nor can it properly be said that those who assume to heal bodily ills or infirmities by a resort to this method of cure are guilty of obtaining money under false pretenses, such as are intended in the statutes, which evidently do not assume to deal with mere matters of opinion upon subjects which are not capable of proof as to their falsity. We may not believe in the efficacy of the treatment to the extent claimed by complainants, and we may have no sympathy with them in such claims, and yet their effectiveness is but matter of opinion in any court."

In the case of *Kar-Ru Chemical Co. v. U. S.*, 264 Fed. 921—a case tried in the Southern Division of the Western District of Washington before Judge Cushman and appealed to the Circuit Court of Appeals, Ninth Circuit, the instructions given by Judge Cushman are approved, and on page 928 we find the following language:

"The law requires that the government must prove beyond a reasonable doubt, not only that the statements upon the labels are false, but also that the statements are fraudulent. The statements may be false and not fraudulent. To be considered fraudulent within the meaning of the law requires that the defendant should either know that the remedy which he offers to the public is of no curative value or that he represents to be of curative value recklessly and without caring whether it would cure or whether it did not, for the purpose of defrauding his customers and getting their money for an article which he knew in fact, or ought to have known, was of no value. If you find from the evidence that the defendant honestly believed, and had reasonable ground to

believe, that his remedy was of curative value, then your verdict must be not guilty, no matter if in fact the remedies were worthless from a medical point of view."

"These instructions were in accordance with the law as declared by the Supreme Court in seven cases of *Eckman's Alterative v. U. S.*, 239 (citing cases), where the court excluded the field where there might be differences of opinion between schools and practitioners, and explained the words 'false' and 'fraudulent' to conform to such exclusions."

7 Cases, etc. v. U. S., 239 U. S. 510. Also L. R. A. 1916D, 164.

On page 169 of the last volume cited we find this language:

"Congress deliberately excluded the field where there are honest differences of opinion between schools and practitioners. Cong. Rec. 62d. Cong. 2d Sess. vol. 48, pt. 12, Appx. p. 675. It was, plainly, to leave no doubt upon this point that the words 'false and fraudulent' were used. This phrase must be taken with its accepted legal meaning, and thus it must be found that the statement contained in the package was put there to accompany the goods with actual intent to deceive,—an intent which may be derived from the facts and circumstances, but which must be established."

In *U. S. v. Natura Co.*, 250 Fed. 925, the lamented Judge Dooling says:

"The defendant is charged with a violation of the Food and Drug Act in misbranding a certain article of medicine sold by it and known as 'Akoz.' To fall within the statute the package or label must bear or contain some statement, design or device regarding the curative or therapeutic effect of the article, or some ingredient or substance contained therein, which is *false and*

fraudulent. No purpose could be served here in reviewing the testimony. It may be said in a general way that the testimony of the government was chiefly 'expert' testimony; that is to say, testimony of skilled persons as to the possible effect of the use of Akoz. *None of them had ever experimented with it*, or tried it either on themselves or others nor had any of them ever had the opportunity to observe any results from its use. The testimony for the defendant was by witnesses, physicians and others who had used the medicine themselves or had observed its effect on others, and all testified to its beneficial effects."

Judgment of "not guilty" was entered.

Judge Trippet in the case of *U. S. v. Tuberclocide Co.*, 252 Fed. 938, discusses very fully the differences of opinion among physicians themselves and the different schools of medicine. On page 941 he says:

"What do these people do that were going to buy this formula and sell this medicine? They get physicians to examine patients that have been treated with it. I think they had four physicians to investigate it, and these physicians advised them that it was a remedy for tuberculosis. Aside from that they bring three physicians here who say they have prescribed this stuff to patients and that it has proven itself by experience to be a remedy. The government doctors never prescribed it to a person, while one of the witnesses for the defense testified that he had treated 3000 patients with it with good results. Do not these people representing defendant have a right to act upon that? Can anybody say they wilfully falsified anything in the face of that testimony? We all know from our own observations that doctors disagree. I have heard them disagree in making sworn statements in this court many a time. Schools of physicians disagree. One school thinks that the other school does not know anything, and

that they are practicing fraud and deception. Can it be fairly said that a man is practicing a fraud when he acts upon the advice of a physician, although other physicians disagree with him? Have we come to such a pass that fraud can be attributed to a man when he accepts the advice of a doctor, or several doctors; notwithstanding that other physicians may disagree with those whose advice he accepts?"

How stands it with the respondent?

It sends a *bona fide* offer of a *free demonstration* to *every physician in the United States* who suffers from Brights' disease or Diabetes. Hundreds of them accepted the offer and *ever since have become regular purchasers of respondent's preparations.*

They *volunteer* the information that reduction of albumen in Brights' disease and of sugar in Diabetes follows the use of said preparations.

How can the government claim that those statements are false and *how can* it claim that when we say on our labels that we have these letters, by the hundreds, making these statements, we are guilty of a *misbranding*?

It is the undoubted law that one is entitled to rest upon statements of physicians in reference to any given remedy; and if he does so he is not to be prosecuted as a criminal or to have his goods seized and destroyed because some other doctor, or set of doctors, may not agree with the doctors whose statements he relies upon.

The respondent is dealing *only with physicians whose names are listed among the duly licensed and*

accredited physicians of the United States. Hundreds and hundreds of them have used respondent's remedies and, after so using them, report certain results following such use. Respondent puts on its labels a small part of what these reports state. The truth of the statements on the labels cannot be doubted or questioned. They are not false, but true. They are not fraudulent but, on the contrary, announce one of the most tremendous facts vital to humanity; viz.: That the physicians of America have had called to their attention a remedy for Brights' disease and Diabetes and that thousands of them have, by actual use thereof, demonstrated the remarkable efficacy of respondent's remedies in those diseases.

It is respectfully submitted that the judgment of the District Court should be affirmed.

Dated, San Francisco,
May 11, 1929.

A. P. BLACK,
Attorney for Appellee.

HOWE & GRAHAM,
Of Counsel.

Diabetes Mellitus

Exhibit A.

Summary of Results Reported by Physicians in Several Hundred Cases
July, 1928

Announcing an innocuous herbal agent, absolutely devoid of dangerous reactions, that does not have to be continued indefinitely and which so decisively reduces sugar and symptoms in patients of 45 and over that for over four years we supplied it to Physicians on a refund basis if the case did not make the usual response to the first treatment, the requests for refund actually being less than five per cent.

And in order to give the Medical Profession a practical demonstration we inaugurated the most comprehensive and convincing program we could conceive of, viz., we tried to reach every Physician in America having Diabetes himself or in his family. Circular letters offering the demonstrations were accordingly mailed to the 145,000 Physicians listed in the American Medical Directory. This looked like inviting disaster, for it seemed reasonable to assume that no Physician having Diabetes himself or in his family would send 1000 to 3000 miles for further measures who had not already exhausted the local prescription counters, and that therefore the only response would be from cases that had resisted treatment and as a rule would look impossible. It was under these difficult conditions that the offers went forward. Four hundred and sixty-two Physicians asked for the demonstration, some involving gangrene and some reporting they had tried nearly everything else without results. All were served. From these we have had 454 reports,

Connecticut ++

Diabetes, female. "If it proves good in her case will use it in my practice."

"I have had some of the best men in the country on her case. They all gave a very poor prognosis. Also had some of the best men at Yale look her over."

7th Nov. later—Enclosed find complete sugar report. (Tests about 6 days apart.)
1st Test . . . 0.83% 9th Test . . . 0.08%
2nd Test . . . 0.38% 10th Test . . . 0.13%
3rd Test . . . 0.56% 11th Test . . . 0.33%
4th Test . . . 0.25% 12th Test . . . 0.25%
5th Test . . . 0.24% 13th Test . . . 0.28%
6th Test . . . 0.33% 14th Test . . . 0.11%
7th Test . . . 0.15% 15th Test . . . 0.17%
8th Test . . . 0.28% 16th Test . . . normal

50 days later—Dr. reported final test—still showing normal. He ordered a further supply, saying "It is the only thing that works."

Indiana +

This physician, who admitted he was "an unbeliever," wrote for the treatment for a poor patient. "The case proved obstinate. Desiring to help this unfortunate as well as convince the Doctor we sent the second lot urging patience. She was on it for months and gave it up. The following delayed letter is the interesting and gratifying denouement."

"Some time ago, in a half-hearted way, I asked you for some of your treatment for a patient of mine too poor to buy it. You were kind enough to send it, and I turned it over to the patient. She was in a bad way and knew it herself, and took it religiously."

"At first she felt better, but there was very little lessening of sugar output. You and she believed in it and she took a second lot. I were kind enough to send. This morning I examined another specimen of urine from her and not the slightest sign of sugar, and she feels better than she has for years. Of course, she followed your diet list to the letter—has eaten gluten bread all this while. I am more eager to send you this report because I have been so indifferent about it myself. I had not even examined her urine for months until her daughter brought the sample, saying her mother was so much better. I reported the case to the Medical Society this P. M. and shall certainly use it in other cases."

Missouri ++

I have been bothered with Diabetes for over a year. S. G. 1030; Sug. 4%.

1st Report—Still some Sugar but in smaller quantities—sometimes none at all—headache better and think I am gaining in strength.

West Virginia ++

Dr. writes—"I am a diabetic. 52. By strict diet am holding sugar to 3%."

First Report—"Improving. Check for record."

Second Report—"Am so much improved am almost well but am afraid to quit the treatment yet. Am enclosing check for one dozen more."

Pennsylvania ++

Dr. writes—"My patient, 62, has had Diabetes 4 years. S. G. 1030, sugar 2½%. Please send."

First Report—"Must say I am improved. Spent \$100. lowered and amount of sugar lessened."

Massachusetts ++

Diabetes, Female. Has age at Hospital on Allen treatment. Age 45, S. G. 1034, Sug. 3.3%.

Six months later—"Some time ago I wrote you for your treatment for Diabetes Mellitus. The patient was in a serious condition, she had had a specialist at a Boston hospital under a good specialist. She took the treatment and diet as directed and the physician and attending physician we are unable to find even a trace of sugar. (The Doctor closes with reference to five cases, one of which appears critical that he is ordering for.)"

Illinois +

"Diabetes, age 48, S. G. 1035, Sug. 3.8%.

66 days later. "Am greatly surprised. In two weeks sugar dropped to 0.4% which I could hardly believe but was more astonished on patient's last test. I could not even find a trace of sugar and was surprised to learn he had gone to work the first time in 6 months. Will have other cases on it soon."

3 mos. later—"Patient got out of the treatment, and is not so well. Duplicate as soon as possible."

San Francisco

Diabetes Mellitus—Arizona Physicians had fought the disease for years. It developed to the gangrenous stage which took the patient to Los Angeles. Failure followed there also and he came to consult physicians here. Both feet were black. The toes were sloughing, the bones protruding, and so offensive the physicians could hardly stay in the room.

It was the opinion of the House Surgeon in the Hospital where the physician placed the patient that one of the legs would have to be amputated above the knee. The physician decided to try to save both legs and put him on the Diabetic agent to render the urine free of sugar. It was eliminated in due course with the gangrene sloughing away to spread and a well-defined line of demarcation was developed. The dead tissue was removed daily and after cleansing with stimulating antiseptic lotions the parts were packed with sterilized gauze saturated with Bovine. (This physician reports: at times the direct application of raw lean steak getting fine appropriation and stimulation, and the protruding bones were cut a number of times. The response was slow but the date this was written both feet were healing showing healthy stumps just below the instep. The Doctor favored us with radiograph of the above case. It will be seen the right foot has healed and the left is beginning to cover, as follows:

Final Report—60 days later—Both feet have healed and the patient has left the Hospital. Sugar and Symptoms negligible.

San Francisco

The Physician who reported the above case specializes in Bright's Disease and Diabetes and has treated a large number of cases reporting that among them he has successfully treated more than a dozen cases of Diabetes that had developed gangrene. To show that the above experience is not rare we quote the two cases following reported by the same physician.

Patient, President of a local Corporation, had been treated for years and gangrene had finally developed. A foot and ankle were sloughing and the gangrene was approaching the knee when the case fell into his hands. He was taken to St. Winifred Hospital on Sutter Street. Consulting Surgeons were called in. It was the opinion that if immediate operation would be fatal. Patient was put on the Diabetic agent. Sugar gradually responded and on its disappearance the physician in the presence of the consulting Surgeons amputated the leg above the knee. Confirming the elimination of the sugar the wound healed and a few months thereafter the patient was out again. He enjoyed good health two years when he suddenly succumbed to an apoplectic stroke.

San Francisco

Reported by the Physician Patient (Mr. P.)—in extremis with Diabetes. The toes were sloughing with gangrene. Had been under treatment in one of the large Hospitals. The Specific Gravity was 1040 after the good health two years when he suddenly succumbed to an apoplectic stroke.

epitomes of over 200 of which have been crowded into this recapitulation. It will be seen they overwhelmingly attest the ability of this agent (for rationale see fourth page) to reduce sugar and symptoms in Diabetes, over 80% announcing the usual results.

These letters and reports contain such a vital message that we had the accuracy of the transcriptions of the first hundred epitomes officially certified and deposited the reports and entire correspondence, involving over 1200 letters, in Wells Fargo's Safe Deposit Vaults in this city for a permanent record of the results herein reported.

We felt a hundred demonstrations in Diabetes would be sufficient but did not suspend till the number was approaching 500. Results per hundred are results per thousand and are now simply cumulative.

We only invited reports during the demonstration, anticipating that after the reaction had started and the sugar waste was seen to be decreasing and symptoms softening Physicians would continue thereafter as necessary, hence most of the reports only cover the first month or so. As to character and permanence of results see fourth page.

From over 400 reports, less than one-fifth of which state there were no results, we select the following as of particular interest. In those marked ††† the Physician is the patient, †† a member of his family, † a patient.

in. He packed the leg in fifty per cent ichthyl with benzoin and in due course controlled this symptom. About three weeks thereafter the gangrene ceased spreading. In due course the sugar was eliminated, the specific gravity was reduced to the normal, and the wounds healed, leaving the great and small toe with nothing between them. At last advices, two years later, this patient was attending to his business.

Illinois +

The following case of Diabetic Gangrene in extremis ("patient a prominent retired official") is reported by a physician who states that he decided to resort to this agent at what appears to have been a critical moment. Twenty days later came the report.

First Report—"Diabetes, age 60. Three weeks ago was in semi coma. Had lost 60 lbs. in weight, pulse so rapid and irregular could not count it. Sug. 5%, S. G. 1035. Small localized skin areas of gangrene and 2 on right foot 1x2 inches with infection. These were dressed with moist alkaline depleting solution and your Ex with carbol. I gave it internally. Result: Sugar gone; urine neutral; skin healing rapidly; infection cleared up; mind clear, and he is feeling almost normal. Sounds foolish as a 3 weeks' result."

Second Report—"As to that very serious Diabetic case he lost much of the covering of the lower end of the Thibia inside the ankle. As soon as the gangrene showed a line of demarcation I removed the gangrenous tissue keeping the ankle in a moist dressing and on the first day that the wound was bacteria free started on blood dressings to encourage healing. The foot is nearly healed and the patient is beginning to get around and will go to his country home for the summer. Have been giving a calculexone injection every other day of 1½ gra. Sodium cacodylate. I see no reason why he cannot live for many years."

Missouri +++

Diabetic Gangrene—Age 46. "Am practically bedfast: four toe nails have come off. Hope the gangrene will stop before I lose toes. S. G. 1042. Sugar 8%. Polyuria. Gravid. Good thirst. Lost about 100 pounds. Excuse pen, am in bed trying to write."

60 days later—"Sugar a trace, S. G. 1030. Polyuria greatly reduced. Thirst normal. Strengthening. Gangrenous foot healing well. Improvement in every way—all far in advance of my expectations. Am sending for another course."

Vermont +

Diabetic Gangrene. "Expect to amputate soon."

First Report—30 days after beginning the treatment it had not halted the gangrene and foot was amputated. "Pare the knee. Patient made good recovery and is now in good condition. Has not felt as well for years. Am allowing a little bread and baked potato. Three-three times a day. I intend to continue to use it as long as results are good."

(Note—One of the most successful specialists here does not operate till the sugar is out, even if it takes several months.)

Chicago +

Physician sends for the treatment for a patient, age 67, with gangrene. S. G. 1038; sugar 8½%.

Without further mention of the gangrenous symptoms one month later the physician reported "Sugar drops 50%. S. G. 1030. Thirst less. Has gained 10 lbs. in weight. Give price in quantity lots."

Missouri +

Male—age 63, Diabetes of 5 years' standing; gangrenous ulcers on toe and leg. Third least has gained 10 lbs. in weight. Gangrene and physical condition improving. Am well pleased.

Illinois ++

Diabetes, Female, age 46. Mother died of diabetes.

1st Report—"Symptoms seem better." 30 days later—"S. G. 1020, no trace of sugar whatever and feeling better. The first 20 days I followed the diet and the second 20 days no restrictions as I wanted to test the virtues of the treatment. I find to day a perfectly normal urine. How about

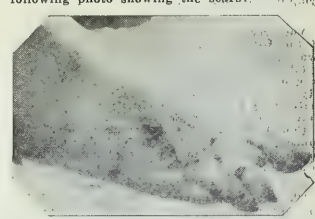
continuing." (Experience suggests continuance for 2 to 3 months, last month on half doses.—J. F. Co.) (The Dr. followed with orders for four patients.)

Michigan +

"Diabetes with gangrene of both feet. Sug. 3.5%. Female age 52. My treatment, gets no results."

First Report—"The 2nd and 5th toes of right foot had sloughed off and foot in bad condition when treatment began. Sloughing has now ceased. Foot in good condition. Wound of amputation has healed. Patient is beginning to put foot on the floor and is feeling much better every way. Sugar at this date 15%. No opiates or other medication required."

60 days later—Dr. writes "patient still weak but gaining right along." He adds, "the foot is now healed" and encloses the following photo showing the scars:



Let us here add to the tender to Physicians that we will send a 60 day course of the Diabetic Agent to every Physician receiving this issue who is treating a charity case of Diabetic Gangrene.—J. F. F. Co.

Massachusetts ++

Patient, a member of the Doctor's family S. G. 1001 Diabetes with gangrene to amputated due to Diabetic condition—wound does not heal. First Report—"Sugar reduced; third gone, with very decided physical improvement; the gangrenous toe amputated 6 weeks ago has not healed but I think it has started." Sugar index to date is—

At start S. G. 1035 Sugar 3%
14 ds. later " 1027 " 1½%
14 ds. later " 1017 " 1%

Second Report—"No Sugar for 15 days and toe all healed except an area about the size of a split pea. Patient is now within 6 lbs. of normal weight and is about his daily work. I used the beef juice dressing with good results."

This physician reports having given part of the treatment to another patient who was also gangrenous and in an extreme condition. The sugar was reduced over half the first two weeks but patient suddenly succumbed. The Doctor adds he had read diet properly and follow instructions and he believed he became septic from the gangrenous toe.

Newark, N. J. +

"Diabetic Gangrene, female with Gangrene of left foot. S. G. 1040; Sugar 5%; alb. 1%. Great thirst, heavy loss in weight, very weak."

40 days later—"The gangrenous patient is certainly doing well since taking the treatment."

40 days later—"S. G. 1020; Sug. none; third gone; gain in weight 35 lbs. Toe amputated. Great improvement."

Month later—"The gangrenous Diabetic is doing finely—able to walk on the foot."

Indiana +

"I have several cases of Diabetes under treatment. Would like to try it out." We sent treatment for his most critical case, a poor woman, 59, with gangrenous Diabetes. Sugar heavy, perforating ulcers on feet, one entire heel having sloughed off."

30 days later—Sug. decreased. General condition improved. Gangrene has been checked and all but two of the places have healed but I don't want to be too sanguine yet. Check herein for treatment for another case "heavy with sugar."

Philadelphia ++

Physician's mother. 73. Sug. 4.17% 1 weight, with gangrene. Have amputated

toes and dry gangrene now threatens both legs. Has suffered terribly for two years. 40 days later—"Will send laboratory reports soon. It is wonderful. Had known if I sooner would have saved all this suffering and two toes. You can take my word for it I will never treat a case of Diabetes in the future without it. I will swear by it now."

Kentucky

Female—Diabetes with gangrene. (Critical.) 40 days later—"Laboratory report today shows great reduction in Sugar (trace) and the gangrenous area is healing fast, one that the Surgeons and myself agreed upon. This was the only show for life but the patient was not physically able to stand it."

Indiana

Dr. writes "I have 2 Diabetics, heavy with sugar (over 6%) excessive polyuria, and thirst, heavy loss in weight, very weak." First Report—"Sugar reduced 30% in one case and nearly 60% in the other. Polyuria halved in both cases; thirst, scarcely none now in one case and much improved in the other. Both are much stronger and have gained in weight 5 and 30 lbs. respectively—greatly improved."

We wrote asking if he did not mean 3 instead of 30 lbs. gain in weight in case two. The Dr. replied "I mean to say he has gained 30 lbs. not 3. Never saw such improvement."

Third Report—"Thirst is virtually gone; less urine, and seldom have to get up at night; sugar much less; S.G. 1026 and 28 respectively."

Fourth Report—"Case 1 improvement continues, patient 2 is at work."

Alabama

This Physician put two cases of Diabetes on this agent (due to the results obtained in a case in his family). Two months later he reported as follows—"One case of Diabetes cleared up at once. The other proved more obstinate. The sugar disappeared but is now back, due as I have good reason to believe, to the patient and not the treatment. I have him in my hands. The treatment (the patient stopped too soon. Treatment and diet should be continued 2 to 3 months after sugar and symptoms disappear)."

Iowa

Your records will show you sent me 1/2 doz. of your agent. I divided it between two patients.

(One)—Mrs. S.—Sugar 2.83%; thirst is gone; elimination nearly normal in quantity; gain in weight 15 pounds. Two examinations by highly competent pathologists now show no trace of sugar.

(Two)—Judge—Excretion was 126 ounces; sugar 4%; the 30th day urinalysis showed 1.4%; total urine 74 ounces; gain in weight 2 pounds.

Minnesota

"The first case, male (56) has gained 15 pounds; sugar reduced to a trace. Codeine and the usual routine has failed."

Second case—female (50) was in a bad way—high sugar; frequent urination; great loss of weight. All cardinal symptoms are abating. Has gained 8 lbs. and prognosis "very favorable."

Florida

In both cases (Diabetes) it acted fine—yet one discontinued as soon as good results were obtained and now I hear is as bad as ever. Check herein for another course—rush.

Michigan

Physician, State Med. Exr. for large Fraternal organization, orders for two cases Diabetes.

60 days later—"Believe both are improving. Duplicate with bill."

40 days later—"Have started the third Diabetic case and now on the third unit with decided improvement. The two old patients continue to improve. Rush duplicates for all three. Check herein."

Chicago

Female, age 50, s. g. 1035, sugar 3%. 60 days later—"S. G. 1025, sugar a trace, polyuria and thirst reduced, strength improved. Very satisfactory results."

Chicago

Diabetes, age 55, S. G. 1032. Sugar 4% with skin eruptions. Thirst and urine excessive (2 gallons daily). Rushed to hospital.

30 days later—"S. G. 1025, Sug. 2%, urine reduced one-half. Thirst less, skin eruptions have cleared, strength improving and general appearance much better. This is wonderful and I believe it will save my patient's life. Have started another case and it is improving."

Minnesota

"Sugar 8%. Anxious to try your treatment."

First Report—"Patient on the fourth week of your treatment and is much improved. The sugar is down to 5% and she feels much better all around. One of the first things she noticed was a marked improvement in her dizziness and also that her eye sight is much better. Can now thread her own needle, something she has not been able to do for many years. Am much interested. Quote in doz. lots."

Michigan

Female, Sugar 2 1/2%, eye sight failing. First report—"Sugar 2%, eye sight improving." 2nd Report—"Sugar 1 1/2%." Patient steadily improving, also yet quite weak.

Brooklyn, N. Y.

Physician writes his sister, age 50, has a critical case of Diabetes. Sugar 8 3/4%, Polyuria 112 oz., excessive thirst, constant headaches, loss in weight 28 pounds, great weakness and general lassitude. Patient has suffered four years. Have tried nearly the whole Pharmacopoeia being also a Ph. G. 28 days later—"I cannot express my sincere gratification at the results. They are astounding and if the progress keeps up as we hope, she says she can never repay you. Due to the critical condition of the patient you can see how gratifying the results have been. Polyuria is now 38 ounces, the sugar less than half, thirst gradually lessened, strength is improved and renewed vigor is appearing. I have told a number of my colleagues and they are astonished as they all said no possible hope."

Due to the critical condition of the patient and the fact that the usual means had been exhausted we wrote the Doctor we wanted to see him eliminate the remaining sugar as a further demonstration to his colleagues who doubtless still believe there was no hope and we sent another 60 day course to that end.

60 days later—"Specific Gravity is now 1022; sugar trace; thirst negligible. Has gained eleven pounds. You speak of it as nothing unusual. I beg to differ. After all that has been tried without result it is astonishing. I do not know what to make of it and continually ask for assurances on my part that it will last." (To comfort her we cited two cases to the Doctor, one of which was in a critical condition, the sugar and symptoms were eliminated in 1901. Both were active at last advices nearly 20 years later. In both sugar reappeared, in one several times, but was eliminated by a short return to the treatment.)

Kansas

Patient, age 62, has been operated on for Diabetic cataract. Sugar 5% with thirst and losing weight. Referred to me for treatment.

Forty-two days later—"Sugar has disappeared, the strength much better, eye healing and can see. Physical changes improved." "The result is marvelous, better than I hoped for." "The Dr. roorders closing—"I want it at hand after this."

Chicago

Female, 59, has been suffering with Diabetes for years. S. G. 1033; sugar 4% with a trace of albumen. Able to be up but at times not so well.

50 days later—"Am pleased to report that the albumen has entirely disappeared, sugar is now 1%, specific gravity 1020 and she is greatly improved in her general health although she has not followed the diet scheme as closely as she should. Am well pleased and trust the results will be permanent."

Texas

Dr. (Company Surgeon S. L. & S. W. R. R. Co.) writes—"I am 60 and have had Diabetes 3 years. Weight has dropped 200 to 155 lbs. A local City Specialist has examined me and was one of the worst cases he ever saw. If you think your treatment will benefit me I will appreciate it if you will send it."

First Report—"S. G. 1022, no sugar. Neuritis is almost gone and strength improving every day. Am stronger than at any time for the last three years."

Mississippi

Physician Dist. Surg. Ill. Central R. R. Co. writes for a patient (a relative) age 60. "Acute Diabetes."

40 days later—"Cannot give the % of sugar at the start except to say it was heavy. Thirst and general griping and griping sensations show no sugar at all. Your preparation has proved its value."

Indiana

Diabetes Mellitus 10 to 15 yrs. standing; Sug. 2 1/2% with alb. now showing at times; dim vision; much neuritis. Have tried Gold, Gole, Tilden, etc., all failed.

First Report—"Sugar lessened and patient feeling so much better I allowed him a trip to Illinois."

New Jersey

"Please send for a case of Diabetes. Other methods do not prove very encouraging."

First Report—"Arrived 2 broken. Gave the rest and he is improving. Duplicate with bill."

Second Report—"There was not much decrease in sugar till the 6th week. Since then there has been a marked change. Last test, age 1020, sugar just a trace. Marked improvement in general condition. Am pleased with the results, and will use it in all cases hereafter."

New York

"Patient, myself, age 54, Sugar 3% and upwards, persistent, complication—severe caruncles. Having heard from a brother physician of the efficacy of your treatment would like to try it out." "Just a line to say it is working out nicely. Sugar has almost disappeared."

30 days later—"Apparently well, still on the treatment but in reduced dosage. Permit me to thank you and congratulate you on your treatment."

Vermont

Sugar "rather plain in spite of a fairly restricted diet. First Report—"Practically no sugar free." "This treatment has worked and shall try it further." (This physician has important official status in his State.)

West Virginia

This physician put 4 Diabetics on the Diabetic agent.

40 days later—"First advices on the four cases follow."

Mrs. H.—, age 53. "Very anemic, had given up in despair when she came to me." Polyuria 100%, polyuria and thirst greatly reduced, pain has disappeared, marked improvement and patient again doing her own housework."

Mrs. B.—, age 52. Sugar 3% drops to a trace, polyuria much less, burning relieved and patient much stronger, pains almost gone."

Mrs. D.—, age 44. Sugar and polyuria reduced, patient's strength much improved, burning relieved."

Mrs. B.—, age 47. Sugar has disappeared, burning and thirst relieved, polyuria about normal and strength much improved."

I am delighted with the results so far. It is bringing me business. Only one thing wrong—you are so far away. I have two more cases impatiently waiting last order."

Brooklyn, N. Y.

Was in Med. Corps, U. S. A. and discharged as permanently and totally disabled due to Diabetes. Thirsty diet and sugar in urine for over a year but symptoms and sugar in blood persist. My condition does not indicate any promise. The prognosis looks bad. If you get me even the slightest assistance it will be a tremendous help."

50 ds later—"Am much stronger, and better vitality, gain in weight 5 lbs. (had lost 70), sugar greatly reduced but blood sugar has risen a bit."

30 ds later. Am nearly out of capsules and would like to continue, apparently benefit but blood sugar is a little higher. Send capsules with bill."

14 ds later—"There is now a decline in the blood sugar of 1/4%. Each 1/4% reduction makes it possible for 10 to 15 grams more carb-hydr in my diet so I can see even a small improvement lends to a very great alleviation in symptoms and diet. Also, I am well assured that my improvement in general strength is real and not a temporary symptom."

Illinois

This Physician ordered for his own case of Diabetes, "loaded with sugar", and a patient (Mrs. O.) Diabetes 4 yrs. standing. Sugar 10% of whom he writes "It is hard to get her to diet."

First report 30 ds later—"Dr. reports sugar has dropped half in his own case and polyuria also. As to the case of Mrs. O. he writes she is away but reports feeling some better."

Pennsylvania

This physician sent for the Diabetic agent for a case under the age limit of our offer (45). However, we sent it expecting it at any rate to reduce sugar in most cases. He later reported "very perceptible change. We asked him to select a case above 45 and we would send a second course to show him we could get results. He accepted and we sent the second course."

We now have the following report—"Beg to say that I used it on two other cases of Diabetes. They both reported good results and have ordered more. Both showed marked sugar content so there is no doubt about the diagnoses."

Nebraska

This physician writes: "Have carried sugar for four years—now one per cent. Dieting continually—am 40 years old. 60 days later—"Feel fine. Am sugar-free today—still on the treatment. Many thanks."

Indiana

Diabetes, 4 yrs' standing. Age 49, Sugar 10.7% (the younger brother, age 38, also has Diabetes. Send him a treatment C. O. D. and say I prescribed it."

First Report—"Have been away and unable to report your treatment. I am anxious to try it. My own case, several years' duration, 53, sug. 2%, S.G. 1030 to 1035. Loss in weight, weakness, nervousness, etc."

70 days later—"Sugar, not at all, in normal range. Am increasing in weight, am stronger, and feel better in every way. Wonderfully improved."

Missouri

I am a Diabetic myself (age 48) and wish to avail myself of your offer. First Report—"Sugar test is light, only occasional. Am feeling fine and am much encouraged since commencing your treatment. Can now eat a liberal slice of bread at each meal without showing sugar. Spec. Grav. around 1018."

New York

Diab. Sug. 6 to 10%, age 66, duration four years.

30 days later—"Good results to report, s.g. 1020, sugar not even a trace, feeling much improved."

South Carolina

Diabetes, in my family, age 45, S. G. 1040, sugar 5%, marked polyuria, excessive thirst, marked weakness."

40 ds. later—"S. G. is 1028, sugar a trace, polyuria moderate, strength improved, 10 lbs. gain in weight. General condition improved."

Pennsylvania

This physician was himself a Diabetic and two years ago was on injections, 15 M. three times a day before meals. He wrote, "I was unable to get away from them." He asked for our treatment and changed to this treatment. He became sugar free and prescribed it for patients with similar results and they are not few may be known from this. On the 10th date this was written he had prescribed nearly \$500.00 worth of the Diabetic capsules. He states that he "stops injections on starting this treatment" and "reduces sugar and changes to this percentage of failures he had had in patients over 45 whom he has put on this treatment he replied, "I have not had any that adhere to diet."

New York

This New York Physician was evidently not quite ready to believe he could transfer Diabetics from injections to mild, internal treatment and reduce sugar and symptoms for on his first order he wrote, "I would be glad to prove your statements true."

50 days later came his re-order, closing "I am treating three cases with remarkable results."

A month later the Doctor's third order reported the practical recovery of all three and a fourth case beginning to respond. He added that the three patients had been on injections for three years."

California

A California physician, who has prescribed several hundred dollars worth of the Diabetic capsules, in answer to a question writes, "I discontinue injections on beginning with your Rx. Still getting splendid results."

California

Physician closes his eighteenth order, "It sure does the work normal (the first patient on this treatment was his own daughter)."

New York

Doctor writes, "I have used your Rx with good results in several cases. Send me your latest literature."

Iowa

With his ninth order this physician writes, "My cases are doing nicely."

Illinois

With his thirteenth order the doctor writes, "Having good success, I hurry."

Illinois

With his rush order for his fifteenth treatment this physician writes, "Have two cases now and both are almost sugar free in less than a week."

Pennsylvania

This physician closes his order for his nineteenth nine-day prescription as follows: "I am getting remarkable results." (He is in an interior city and his patients are evidently going to him from a wide range.)

Illinois

This physician got such results from his first treatments that he writes he is thinking of limiting his practice to a question writes and asks "Can I be sure of quick service?"

Pennsylvania

With an order for one dozen more of the nine-day prescriptions this physician writes, "Have a number of patients. We tried your Rx on them and it worked like a charm." Forty days later—Doctor duplicates his order, closing, "It is ideal."

Mississippi

Diabetes—S. G. 1040; Sugar 5%; polyuria excessive; great mental weakness; with cough and expectoration suggesting T. B. Has lost 30 lbs.

46 days later—"S. G. 1016; sugar at times none; polyuria less; strength improved; cough relieved; gain in weight 5 lbs. Marked improvement—has gone to work."

Texas

Patient—Physician, age 40 confined to bed in P. & S. Hospital. Sug. 6%. Polyuria, 3600 to 4000 cc., great thirst, loss in weight 75 lbs., very weak, swelling feet, neuritis, considerable loss of eye sight. Consulting Physician, etc. "He has been to the best men in the U. S. without improvement."

30 days later—"Sugar none, urine 1200 to 2000 cc. Thirst none, has gained 4 lbs. in wt., strength improving, eye sight better."

California

Am 50 and have had Diabetes 3 yrs. When I diet carefully I am now S. G. 1030, sugar 3%. At times when practice overworks me it runs as high as 1040 and 8% sugar. (Unusual thirst, polyuria and loss in weight of 15 pounds.)

30 days later—"S. G. 1022; Sugar, a trace, Polyuria and thirst gone. Strength improving."

Illinois

This physician reports close attention to results in three cases of Diabetes on this treatment. The first one a ten year range up to 1050 S. G. of 15 years. The patient feels he has recovered. The other two are dragging down both sugar and albumen to a trace. It is remarkable."

Michigan

First Report—"Sugar 8%."

Second Report—"Much better—will prescribe."

Ohio

S. G. 1033. Sugar 11%. Polyuria, extreme thirst. etc."

2nd Report—"S. G. 1028. Sugar 5%—Thirst and polyuria much less, other symptoms modifying—and on same diet."

3rd Report—"Out of our treatment and found thirst and polyuria returning."

(A return to this agent is again improving.

Iowa ++

This physician sent for a trial order for "Diabetic diet" for the patient. Three mos. later—"please duplicate—am well pleased and wish to go on."

New York ++

Sugar 6% with Pruritis Vulva. Have had 4 years of Diabetic diet with local treatment "with very little improvement."

First Report—On receipt of your preparation placed her on same at once with Phenol, Menthol, etc., for the Pruritis. There was general improvement. The sugar promptly decreased to 3% and the Pruritis cleared up.

Virginia ++

Physician writes for treatment for patient 40 years of age with Diabetes; S. G. 1030; Sugar 2 1/2%.

First Report—"Am glad to report gratifying results. Sugar has been reduced from 2 1/2% to 1 per cent and improvement continuing in every way."

Indiana +

A failure that a little more patience would probably have averted, and the interesting case is reported by an Indiana Physician.

Patient—age 48—sugar 4 per cent. The Diabetic agent reduced the Specific Gravity from 1032 to 1020 the first week. But, as the patient grew weaker it was discontinued. It commonly requires 2 to 3 weeks for emaciation to begin to modify, hence, more patience was required than was shown here. The first week's drop in Specific Gravity (1032 to 1020) was a normal much earlier response than usual and showed that the sugar absorption was under way. We wrote the Doctor accordingly and advised if the patient still objected that he give the remainder to the first poor Diabetic that came his way.

Sequel—5 months later—"I gave the balance of the treatment to a poor woman, age 58 suffering with Diabetes. It is doing her so much good that if not too expensive I will buy one-half dozen and present it to her. Please quote." (Doubled.)

Salt Lake City +

Diabetes—Sugar 5%. 60 days later—Patient improving—check for another supply.

60 days later—Steady improvement—check for another supply.

Missouri ++

Sent a course to this physician for a case in his family, age 48, sugar 3%.

First Report—"Improving—sugar 1 1/2%." (With order for another course.)

Second Report—"The two cases of Diabetes have improved so much that we do not need my services. (The Dr. encloses order for 2 more cases.)"

Florida ++

My own case—both sugar and alb.—several years duration.

30 days later—"Am feeling much better. No sugar for 10 days also I am eating some carbohydrates. Polyuria has decreased and the thirst has disappeared. Only a trace of alb. at times."

Illinois ++

Doctor writes—"Have a case of Glycosuria on which I would like to try your treatment." (Urinalysis enclosed shows Sugar 8%.)

1st Report—"Sugar trace only, patient improving."

Illinois ++

Dr., 43, writes—"Sugar 3%, a symptomatic case."

1st Report—"On treatment a week. No change."

2nd Report—"Sugar drops one-third, s. g. 1024. Feeling well."

Month later—"Sugar, trace to 1 1/2%, s. g. 1015 to 1025. C. O. D. another course."

Bethel, N. H. ++

Dr. writes—"I have Diabetes in my family."

90 days later—"Patient has taken the half dose, with the most gratifying results. Send one doz. more, 6 for above and 6 for a patient."

San Francisco ++

Diabetes Mellitus, sug. 3.5%.

Report—"The treatment reduced the spec. grav. and sugar in the cases treated in my practice as well as in my own case and I do not hesitate to say it is due to the treatment with the medicines in the Materia Medica as worthy of trial and consideration. I consider it has been a great factor in the longevity of my life. In my own case the gratifying reduction of the sugar the physical symptoms correspondingly diminished."

South Dakota ++

So. Dak. Physician, "age 46, sug. 2 1/4%, resting in Southern California."

First Report—"Must admit I began with little faith. However as I gradually tried one forbidden food after the other without a reaction to Fehling's test my doubts were removed. I am now able to eat my own Rx is actually a Diabetic medicine. Will prescribe it in S. D. on my return." (In our experience the return to mixed diet was two months.)

Nebraska

Physician writes—"Am treating several cases with your Rx with excellent results." Referring to one, he writes—"He was rendered sugar-free for three months. On advice of a kind (?) relative he drifted to a sure-cure Doctor. He came back 2 weeks ago without than ever and willing to get down to business again."

Oregon +

"I used your Rx in a case of Diabetes, urinalysis at start showing 3.5%. In 2 months not a trace."

New York ++

A case that failed when apparently well in hand illustrates the necessity for persistence in diet and watchful control, and is presented due to the careful record that was kept. The patient (former President of the State Board of Medical Officers of the State of New York) was at the end of a long struggle with Diabetes and went to San Diego in an effort to prolong life. Was so weak only went out in the park occasionally on the arm of a relative.

Response in both sugar and symptoms was very slow but so definite that the sixth month to the day he left the doctor's care and went to San Francisco and called in person. He was in fine vigor and stated that he intended to return to practice. The sugar index to that date, as shown by the Wasserman reports about three weeks apart, was as follows:

Sug. 5.50%	S. G. 1027
" 3.80%	" 1022
" 3.00%	" 1020
" 3.20%	" 1020
" 3.00%	" 1018
" 2.58%	" 1018
" 2.58%	" 1010
" 1.08%	" not stated
" 0.97%	" 1011

We asked the cause of the sudden increase in sug. and spec. grav. the third month. The Dr. stated that he had been taking a specially advised milk and egg-nog and he consumed 3 qts. daily. But he had to abandon it when the sugar immediately decreased.

Later the Doctor's consulting Physician (a relative) called to say that he was feeling so well he came to San Francisco and probably took too many liberties with the diet for his return acidosis immediately set in with a fatal termination. (The patient was in his 74th year.)

The attending Physician stated that the sugar and symptoms had so definitely responded to the treatment that it had resulted in a decision to go East and specialize in Diabetes.

Illinois +

This Physician ordered for two cases Diabetes. With his third order he reports—"I am getting splendid results. Both cases, females, were practically in bed and are now up and doing as much work as ever, and gaining in flesh. Both specimens normal s. g., three pints in 24 hrs. But on standing a few hours test gives 12% trace of sugar. Hence check for two more treatments."

North Dakota ++

Physician writes from a Hospital of which he is in charge, stating that a brother and sister have Diabetes, one of 5 years and the other of 12 years development.

60 days later—Both report progress with reorder in each case.

Later—"The Doctor reports both improved and orders for a new case closing. 'I know of nothing better than your treatment.'"

Illinois ++

Physician writes—"Am 54 and been afflicted with Diabetes two years."

50 days later—"Improvement in all symptoms. If I continue to do as well shall be well satisfied."

3 wks. later—"Am sugar free, s. g. 1020 and feeling better in every way. How soon can I resume normal diet." (Ans. below.)

3 wks. later—"Am eating fruit, still sugar free feeling first class. Check herewith for another treatment."

Colorado +

Dr. wrote "I have a case of Diabetes that does not respond to the regular treatment."

80 days later he wrote—"The sugar cleared up. I was out of town and patient got out of medicine and sugar returned. I put him on the treatment again and the sugar has cleared up. C. O. D. another course. When is it safe to stop?" (Ans.—from two to three mos. after sug. and symptoms have disappeared, taking the last month in half doses.)

California ++

"Two years ago I used your Rx and was so favorably impressed that I now wish to try it in my own case (Diabetes). Where is nearest supply?"

40 days later—"Am greatly encouraged, no sugar for 10 days, itching has ceased, am sleeping better, less nervous, am gaining strength and a little in wt. My Diabetic cases will get your Rx."

Texas ++

Diabetes—Patient member of Doctor's family.

First Report—"Urine reduced 20 per cent—sugar decreasing S. G. 1025, weight has increased 4 pounds. Duplicate with bill. Yours fraternally and gratefully."

Colorado

"I have used both preparations with good results. Practically all have been helped. What I want to know is whether their use is efficient for prolonged use. We have known of cases in which the only effect seemed to be amelioration of symptoms in which it was taken off and on for several years with only slight results. In a typical case the report was 'Do not feel nearly so well without it.' The following from an Oregon physician also answers above—"We have used the Diab. agent for the last 10 yrs. and while it has not cured him it has prolonged his life and made him comfortable also he does not live right."

Iowa ++

"I am sending you draft for reorder. I am out and hope you will push it along. Am just through the fourth week and have a specific gravity 1020 with trace of sugar. Had 1020 s. g. one month ago with abundant sugar."

Illinois ++

Physician writes—"Am 52 and have Diab. myself."

60 days later—"I am greatly improved. I tried several things the past 6 yrs but nothing gave immediate and positive results like your treatment. S. G. 1035 is now 1028. Blood pressure 180 is now 140. cedema ankles has disappeared. Was getting up three times a night, not at all now. Am much stronger. (The Dr. writes for two more treatments, one for self and one for a patient.)"

Florida ++

Have a patient, prominent, would like to help if possible. Is refractory, S. G. 1032, sug. 4% albumen, neuritis, etc. 3 months later—S. G. 1026, sug. trace only, Polyuria a third less, neuritis not so bad. 20 days later—Last 2 exs. show no sugar. Have just put another case on it.

Detroit ++

Diabetes—wife, 57, s. g. 1032, with sugar. 60 days later—Gave your Rx with the result that ere the half dozen were exhausted the urine had become normal from a 3% of sugar.

Missouri +

I have a boy 23, S. G. 1032, sug. 2%. Check herein for treatment.

We wrote that recoveries were so few in young cases of Diabetes we were returning his check, but were sending him a 30 day trial of your Rx. He did not a favorable reaction he could then reorder.

2 months later—"Results have been good. Check herein for 60 day course."

2 months later—check for another 60 day course, no report.

2 months later—check for another 60 day course, no report.

3 months later—check for another 60 day course, closing. "How long would you continue after patient is sugar free?"

California ++

Physician writes, am 45, passing 80 ounces, Sugar 3%.

30 days later—"Am improving but not as fast as I could wish. I gave one box to a patient. Her progress is marvelous and I wish to place her on full treatment. Check herein for same."

60 days later—"Am improving splendidly—no sugar for 2 weeks. Check herein for 3 months course. Am also advising it for a patient in Canada."

Connecticut ++

Dr writes—Have had Diab. 15 yrs. Have exhausted all ordinary forms of treatment. Sug. 5%.

40 days later—Sug. still 5% but urine and thirst are decreasing.

40 ds later—I write you with much satisfaction. Must say with surprise there is striking improvement—less urine, sug. has dropped from 5% to between 1 and 2% and feeling more vigorous mentally and physically. Check herein for reorder.

Texas ++

Diabetes—My own case, age 52, polyuria, thirst, etc.

45 ds later—S. G. has dropped from 1030 to 1018; polyuria and thirst have disappeared, strength improved. Check for repeat.

50 ds later—Still improving. Check for repeat.

3rd report—Am still losing weight, check for repeat.

4th report—am not losing weight now like I was. Am putting another patient on the treatment—male, age 86 yrs. Check for repeat.

Pittsburgh ++

Dr. writes—"Forward two courses, check herein. Want it for myself. Last year it cleared me up entirely but now I find it returning." (Previous correspondence showed 12% sugar with loss of weight predominating when starting the treatment.)

Missouri +

Diabetic, age 45, Glycosuria 3 yrs. Nothing he has taken would lessen the sugar. 60 ds later—Sugar has dropped 35%, corresponding decrease in s. g. patient has gained 8 lbs. in weight.

Kansas ++

Physician, age 45, with sugar, Dyspnoea and cedema.

34 days later—"Sugar of 2% has disappeared; S. G. 1021; thirst normal; gain in weight 5 lbs.; strength improved; bloating has disappeared; appetite normal."

Indiana ++

First Report—Sugar 12.8%.

Second " " 9.5%

Third " " 6.2%

Fourth " " 4.2%

Fifth " " 2.5%—Am 75% im-

Indiana ++

First Report—Sugar 5%

Second " " 4%

Third " " 4%—with good results.

Illinois ++

First Report—Sugar 4.0%

Second " " 3.5%

Third " " 1.5%

Fourth " " 1.4%—Cramps less, less

5th " " 1.3%—Thirst, and gaining strength.

"Have two patients on the treatment. One is definitely improved; the other not much—does not diet."

Illinois ++

First Report—Sugar 3.2%

Second " " .5%

Third " " none

(Patient's age 30 years. Again regret to say we had but little confidence as to permanence in young cases.—J. J. F. Co.)

Texas ++

First Report—Sugar averaging 8% in 3 months later—due to critical illness in family, I made no tests and the Diabetic Agent was only taken when I was nearly past going." Dr. closes, "Will say that only by using it have I been able to stay at my work."

Oregon ++

First Report—S. G. 1036 Sugar 3%.

Second " " No reduction—discouraged.

The date of the second report showed the Doctor had been out of the Diabetic Agent several weeks and had had time to lose ground. We sent another 60 day course urging patience. Within 30 days thereafter he had recovered lost ground and sugar absorption was under way as will now be seen by the 3rd, 4th and 5th reports as follows:

Third Report—S. G. 1030 Sugar 1 1/2%—Change for better.

Fourth Report—Sugar not stated—"Am very much improved. Will prescribe."

Fifth Report—Sugar not stated—"My condition is greatly improving far beyond my expectations. Have prescribed it in another case with good results."

New York ++

Female, age 45.

First Report—Sugar 6% "constant, with great emaciation and pains in extremities. Have a large practice and if it helps her she will be happy to prescribe."

2nd Report—"Four weeks later—Sugar none. 'Marked improvement.'"

Chicago ++

Diabetes; Female.

First Report—Sugar 5%.

Second " " 2%

Third " " 2%

Final " " none

Washington ++

This physician sends for course of the Diabetic agent due to the following previous experience. "I advised your treatment in two cases of Diabetes in children with favorable results. One, age 12, is doing well and seldom shows sugar. The other, 8 years, will show no sugar so long as treatment is continued, it appears at once when stopped. The last case was under the care of a specialist for months with no relief." (As stated elsewhere, regret to say we have little hope for permanent results in young cases.—J. J. F. Co.)

First report on new case—no benefit.

Chicago ++

Age 54. "Sugar 5.8% laboratory analysis. Have tried everything I know to get the sugar down. 30 days later—"Sugar 1.4% and on same diet. Am much elated."

Later—Patient under severe mental strain, sugar up to 6%. Later—Sugar drops to 4%. Later—"Am feeling better. Have no hesitancy in prescribing. It is proving all you claimed."

California ++

Dr. writes he has three cases on the Diabetic agent, one of the gangrenous stage. Only the first had taken it long enough to report on as follows: "Sugar of 6% dropped a third the first 19 days."

Chicago ++

First Report—Sugar 3%

Second " " 1%

Third " " 1%

Ohio ++

Female, Sugar 3%.

2 months later—Sugar nil—"On the same diet."

Indiana ++

Diabetes, Male. Usual treatment had failed.

First Report—Sugar 8%.

Final " " none—much improved.

New York ++

Diabetes, Female.

First Urinalysis—Sugar 4.1%

Second " " 2.7%

Third " " 1.9%

Fourth " " 1.9%

"Quote prices for my druggist."

Missouri ++

Physician (conducting his own Sanatorium, had 5 1/2% of sugar and tried the Allen treatment for 18 months.

First Report—S. G. 1035 Sugar 5.5%

Second " " 1028 " 3.0%

Third " " 1028 " 2.5%—Am

doing my share of practice and feeling fine."

Fourth Report—"Have been sugar free 30 days. I have also a patient on the treatment."

Fifth Report—"I am fine and my patient is doing well."

Illinois ++

Diabetes, 10 years' duration "Thirst at times frightful."

First Report—S. G. 1028—Sugar not stated.

Second " " 1028 " 1%—less."

Third " " 1022 " 1%—

"Much better." (As the leg cramps were obstinate, we sent another 60 day course.

Fourth Report—60 days later—"S. G. stationary at normal. No trace of sugar. The benefit is remarkable."

New York ++

1st Report Quant. 6 pts. Sug. 3.4%

2nd " " 4 " 1.42%

3rd " " 4 " 1.42%

"Much improved. Believe in 2 months will be sugar free. Will positively prescribe."

Indiana ++

Diabetes, 3 yrs. age 43 yrs. 19%. First report—"no results," no details. Getting no further advice we reported it in these columns as a failure. Later the Dr. wrote he had had but little confidence as to permanence in young cases.—J. J. F. Co.)

JOHN J. FULTON CO.
88 First Street
San Francisco, Calif.

Dear Doctor:

As requested, we hand you epitomes of several hundred reports, the results of a demonstration to the Physicians of America having Diabetes themselves or in their families. See fourth page for Rationale and Ingredients.

It is so revolutionary and so hard to believe these results can be had through mild, innocuous, internal treatment that we are sending you by same mail, with our compliments, 1/4 Dozen Boxes (27 days' treatment) of the Diabetic Capsules, and if the patient is over 45 and will help with the diet and you have the usual experience, you can begin to look for the sugar and specific gravity to start down, in most cases, between the 10th and 15th days, followed shortly thereafter by decreasing polyuria, thirst, etc.

Kindly hold the 27 day treatment to one patient for it may happen that the sugar and spec. grav. will not begin definitely diminishing until between the 15th and 20th days. Again, cases often begin to respond as early as the 10th day.

The administration is simple (2 Capsules t.i.d.- p.c.), given alone if patient is merely on diet. Any troublesome symptoms may be treated just as if it was not being given.

As most of the so-called gluten breads have to have 20 to 30 per cent starch to hold together, we suggest substitution of the bran muffins (see brown card herein) for the item of bread in the diet. These are inexpensive, can be made at home, are very palatable and contain practically no starch, and, in our opinion, will aid you to get the desired results.

The treatment is divided into six nine-day prescriptions to keep the patient in close touch with the Physician, thus assuring attention to diet and detail that make for the best results. These Capsules are not stocked but are mailed to Physicians at \$6.30 per 54 day course. As it is impractical to open small accounts throughout the United States (we know of no State in which this agent is not being prescribed) in ordering kindly enclose check, or, if desired, pay the postman. While two treatments often eliminate the sugar (frequently the first accomplishes this result) we have found it best to continue the treatment for two months after sugar and symptoms disappear, giving the last month in half doses.

A diet list is enclosed in each box of the capsules.

Counselling patience and anticipating the usual response,

Yours very truly,
JOHN J. FULTON COMPANY.

SOME FURTHER REPORTS - THE FIRST THREE CASES IN COMA

TEXAS

Patient, 68, for whom I ordered this treatment, was in coma one week before I gave it to him. I brought him out with Insulin injections and put him on your Rx. Sugar has reduced from 5.50% to less than 3% and I want him to continue. He allowed himself to get entirely out. Check herein for another course. Later - with check for re-order the doctor writes "not sugar free but is in every respect much better." (This patient does not treat his doctor fairly. Although in the crises of coma at one time (usually the end) he does not take the treatment with sufficient continuity to completely eliminate the sugar and, in our opinion, will be in his physician's hands again in due course.) (J.J.F.Co.)

KENTUCKY

Find check for Diabetic treatment. "Have patient, 59, getting worse. Wish I had it today. Rush."

Four months later - "My first order I am quite sure robbed the grave of my 59 yr. Diabetic of 15 yrs. standing. The treatment relieved her of every symptom, impending coma to sugar free, S.G. normal. After she got able to do all her housework I lost track of her but now she needs more. Duplicate at once. Am thorough convinced as to the value of this agent in Diabetes." (Another case of patient stopping treatment too soon - J.J.F.Co.)

CALIFORNIA

This physician, specializing in Kidney cases, reported the following in person: "Patient, female, 35, in deep coma in the finale of Diabetes. Attending physician felt the situation was hopeless when I was called in consultation. I gave saturated solution of Sodium Bicarbonate by injection into the veins and thru the Murphy drip and injected a heart stimulant. Patient rallied and I put her on your Rx, with steady improvement". At date of report (a month later) patient making fine progress and physician anticipated her recovery.

INDIANA

"My patient, female, 59, is doing so well I want her to continue. Her S. G. has been reduced to 1024 and at times she is sugar free; polyuria, thirst, etc. wonderfully improved. Have another case I want to put on it, hence check herein for two more treatments. Others are watching the progress of my cases and I am sure will want it soon."

WISCONSIN

Physician divided first course between two patients. (1) age 65, seven years standing, S.G. 1035, much sugar, with pruritis and swelling limbs. (2) Age 63, S.G. 1034, strong sugar. 40 days later - "Both are improving - duplicate last order."

PENNSYLVANIA

This physician closes his second order - "I used the first course on a man, 48, who has had Diabetes for years. Sugar disappeared the fourth week but I want to continue for a while yet."

WASHINGTON

50 days ago you sent me a course for a Diabetic 73 years old. "It has done wonders for him. Check herein for another treatment. Rush - am in a great hurry."

PENNSYLVANIA

60 days after his first order Dr. writes - "Herein check for two more Diabetic treatments. My patient shows improvement. Want first patient to continue and am starting another case on it."

ILLINOIS

Doctor orders one Diabetic treatment rush. 2 months later - Dr. reorders, closing - "I have used the first treatment and sugar has disappeared. I want to continue."

DIABETIC GANGRENE

Diabetic gangrene has been considered a particularly hopeless aspect but reports like the following will show how definitely this symptom also is responsive.

CALIFORNIA

Physician reports a critical case of Diabetic gangrene sent to him from Ariz. Toes were sloughing and bones protruding. Consulting physician felt one leg would have to be amputated above the knee. Response was slow but about the 90th day the physician reported both feet had healed, sugar and symptoms negative.

CALIFORNIA

Another reported by same physician. One foot had but two toes left and the physician felt uncertain as to the outcome. Response was very slow but about a month later the gangrene ceased spreading; later, the sugar was eliminated, wounds healed and at last advices patient was attending to his business.

PENNSYLVANIA

Physician's mother, 72; Sugar 4.17 per cent, with gangrene.

"Have amputated two toes and dry gangrene now threatens both legs."

40 ds. later - "It is wonderful. Had I known it sooner, would have saved all this suffering and two toes. Take my word for it, I will never treat a case of Diabetes in the future without it. Will send you the laboratory reports later."

MISSOURI

Physician ("in bed") writes: "I am the patient. Sugar 8 per cent. Have lost 100 lbs., toe-nails have come off with gangrene."

60 ds. later - "Sugar, trace; gangrenous foot entirely healed; improvement in every way and far beyond my expectations."

ILLINOIS

Physician reports Diabetic, 60, was in semi coma. Sugar 5 per cent; gangrenous area on right foot.

60 ds. later - "Foot is nearly healed and patient is beginning to get around. I see no reason why he can not live on many years."

MICHIGAN

Physician reports Diabetic with gangrene of both feet; Sugar $3\frac{1}{2}$ per cent; two toes sloughed off. "My treatment gets no results."

60 ds. later - "Foot is now well. Patient gaining right along."

NEW JERSEY

Physician reports female, with gangrene of left foot. Sugar 5 per cent; spec. grav. 1040. Toe amputated.

Month later - "My gangrenous Diabetic is doing finely, now able to walk."

IOWA

Doctor writes - "Check herein for 54 day treatment for patient, age 60, with Diabetic gangrene."

60 ds. later - Dr. re-orders, reporting: "Patient had an ulcer on left foot for 3 yrs. and three ulcers on right foot for 6 mos., a piece of bone an inch long sloughing behind the small toe. All ulcers healed, patient still on treatment."

KENTUCKY

Physician reports case Diabetes with gangrene so critical "the surgeons and myself agreed amputation was the only show for life but the patient was not able to stand it."

40 ds. later - "Laboratory report today shows great reduction in sugar (trace) and the gangrenous area is healing fast."

INDIANA

Physician reports female; 59; heavy sugar; perforating ulcers on feet, one entire heel having sloughed off.

40 ds. later - "Sugar less, general improvement, gangrene checked - all but two of the places have healed. Check for "another case."

THE [illegible] OF THE [illegible] IN THE [illegible]

[illegible text]

[illegible]

[illegible text]

[illegible]

[illegible text]

[illegible]

[illegible text]

AS TO PATIENTS ON INJECTIONS

The development of glandular injections, now so generally used, was a valuable contribution to Medical Science and in cases of Acidosis and Diabetic Coma the reaction is frequently marvelous and almost immediate. But after the disappearance of this symptom and the cases run on into years there is a constant and growing desire in both physicians and patients to dispense with the injections and physicians are now successfully substituting this treatment which not only reduces sugar but does not have to be continued indefinitely. (About two months after sugar and symptoms disappear.)

In answer to inquiries from physicians who contemplate prescribing this agent with a view of discontinuing injections as to what the best practice is, let us present the following extracts from letters from three physicians who have had large experience with this treatment, viz:

Dr. S. - whose practice involves an unusual number of Diabetics (has had over 800 of the 9 day prescriptions) writes, "I stop the injections upon starting this treatment." To the question "What percentage of failures have you had in patients over 45 you have put on this treatment?" he replied - "I have not had any that adhered to diet."

Dr. H - who has gotten such gratifying results he anticipated specializing in Diabetes, writes, "As to patients on injections I discontinue them at once."

Dr. D - who has had over 400 of the 9 day prescriptions, writes, "I discontinue serum injections on beginning with your Rx. Still getting splendid results."

Wisconsin physician reports case of Mrs. B. Had lost 30 lbs, in 60 days. Condition deplorable. "I put her on injections three times a day. On receipt of the capsules I discontinued the injections and gave two capsules three times a day." Sugar 7 gms. per 100 C.C. of urine. Twenty days later was sugar free, gaining flesh and delighted. Order to continue.

An Oregon physician wrote "I have a Diabetic on injections. Want something can be given by mouth." The Doctor's next letter reports. "Sugar disappeared the third week, patient feeling fine." Now have another. Order for both.

A New York physician's reports on his first four cases, two of which had been on injections for several years: He divided his first order between three patients. His second order reported all three as getting "remarkable results." His next order reported all three had yielded and he was permitting them to widen their diets (in our judgement over a month too soon. J.J.F.CO.) and contained his first report on a new case transferred from injections.

A Texas physician reported fine results in what appears to have been a case in extremis. "Patient, 68, was in coma one week. I brought him out with Insulin and put him on your Rx. Sugar reduced 50%." With a later re-order the doctor wrote, "Not sugar free but is in every respect much better."

And a California physician who has successfully treated many Diabetics with this agent has stated to the writer that he has also given it and the injections to the same patient, decreasing the injections as S.G. and sugar diminished. The writer feels the procedure outlined by the physicians quoted above is not only simpler, more direct and more practical but some of the variations in the diets patients on injections at times require would, in our opinion, largely nullify the corrective tendencies of this treatment.

TRANSFERS FROM INJECTIONS AND OBSERVATIONS THEREON

PENNSYLVANIA

This Physician, himself a Diabetic and on injections, writes, "I took 15 M. t. i. d. before meals. About one year ago I started on your capsules and followed closely your diet. I am sugar free and a number of other patients I treated with them. I think they are the best thing known for Diabetes at this time. I stop injections on putting Diabetics on this treatment."

IOWA

The Doctor writes, "Am 51. Have had Diabetes 2 years. Am on injections. If you have something that will get away from injections I would like to try it." The usual 30 day demonstration was forwarded.
Report - "I am 50% better since taking the treatment."

KANSAS

"Have a female Diabetic; on injections 2 years; is now totally blind. Would like to relieve her of the injections." We sent the usual 30 day demonstration. Report - "She is doing as well or better than on injections. Sugar has reduced". 60 days later - "Is on 2nd installment, doing fine without injections and is delighted."

MISSOURI

"I am treating three cases over 45. Would like to try something besides the needle if I can get results." Report on his 30 day demonstration - "Sugar has practically disappeared. Better in every way."

FLORIDA

"I have a patient to whom I have been giving injections for some time but does not respond as I would like; is very emaciated." We sent the usual 30 day demonstration. Report - The Doctor does not give the sugar decrease, merely reporting that "The treatment has done all you said it would and I am very much pleased."

TEXAS

"Am treating a Diabetic, age 49. Has taken many injections." Report on 30 day demonstration. "She is 50% better than she has been for four years."

WISCONSIN

Dr. reports case Mrs. B - 70 grs. sugar to 100 c.c. of urine with distressing symptoms. Had her under injections three times a day until the demonstration was received. Discontinued the injections and instead gave two of the capsules three times a day. Twenty days later urine showed entire absence of sugar. "Patient gaining flesh and delighted."

OREGON

Diabetic age 75. Doctor writes, "I have him on injections. Want something that can be given by mouth." Sent 30 day demonstration. Report - "Sugar disappeared in less than three weeks, patient feeling fine."

NEW YORK

Among this Physician's cases were three Diabetics, "two of which had been on injections for years." In due course, following the demonstration and an additional order, he reported all three as getting "remarkable results." And on a later order reported all three had yielded and he was widening their diets.

In cases transferred from injections it is important to bear in mind that such patients at times have had to have such things as orange juice, chocolate, etc. to overcome unpleasant reactions and some feel they can continue same with this treatment, but such liberties largely nullify its results. Hence, to get satisfactory results, the diet with this preparation and the substitution of the starchless bran muffins for bread are strongly urged.

SOME INTERESTING LATER REPORTS

CALIFORNIA

This Physician reports recovery in another case of Diabetic gangrene. Case P-n. Leg so involved his first Physician urged amputation. Rx was given with daily cleansing of the gangrene areas. This Physician had previously reported recovery in case of P-h. Toes were sloughing. Two had disappeared. So serious the outlook was uncertain. Patient was discharged the 5th month.

MICHIGAN

With his 3d order, this Physician writes - "I wish to express my appreciation. I have used your Rx in two very severe cases of Diabetes. They are both sugar free now and feeling fine."

PENNSYLVANIA

A reorder from this Physician closes - "Had two cases Diabetes on your treatment a year ago. Made a success in both cases. But now, one comes back. Maybe she did not continue long enough. (Altho the treatment is advised 2 to 3 mos. after sugar and symptoms disappear, last month in half doses, too many stop at once on getting comfortable.) (J.J.F. Co.)

IOWA

Doctor's first order - female 56. 40 ds. later "Patient is responding. You will hear from me again." 60 ds. later - "Doing fine, wt 164 lbs s.g. 1018." Later - The Dr. closes his 6th order - "It certainly eliminates sugar under careful diet in short order."

NEW YORK STATE

Two months after the first order the Doctor ordered for his second Diabetic closing - "My first case has made wonderful progress. In fact I consider her cured."

NEW YORK STATE

"In 1924 you sent me treatment for a very stubborn case with both sugar and albumen. The patient (chief of Police) had lost 40 lbs. He is to all appearances cured. I now have another stubborn case - send C.O.D."

VIRGINIA

Physician writes - "I treated a man (64) with your Rx who had been given up. Treated him four months. He is now sugar free; leg pains gone and he is able to put in a full day's work on his farm. Quote in quantity lots and send literature to my brother Dr.---."

CALIFORNIA

Doctor writes - Two years ago I took your Diabetic treatment and got well. But a severe attack of abdominal Flu has caused a return of the Diabetic symptoms. Check herein for reorder.

OHIO

Another Physician who divided his first treatment between two patients. 35 days later - "The female patient is doing nicely. Itching of the vulva all gone, feels well and some days shows no sugar. The male patient is gaining in weight, feels better and is at work (watchman) but sugar has not reduced much hence am sending for more,"

PENNSYLVANIA

Doctor's first order closes - "I hope we will get results as your literature leads us to believe." 63 days later patient (probably member Drs family) writes on the Doctors orders to rush another course, "greatly benefited and do not want to be without it."

OHIO

With a reorder this Physician, former President of his State Medical Board, writes - "I have used your Rx in several cases (Diabetes) with good results. Send at once."

ILLINOIS

With his check for his twelfth order for the Diabetic treatment this Doctor reports - Am having good success - hurry it on.

We crowd the accounts of 12 Physicians into this page, Six in Cities and Six in Towns, to accent a most important fact, viz. - the consistent character of the response to this treatment, the figures testifying as nothing else can that Physicians are not only getting results but the same results over and over.

There are about 20,000 annual deaths in the U.S. from Diabetes. Assuming six years of life for each there are about 120,000 cases, (about one for each 1000 of population) less than one case annually for each of the 150,000 Physicians. It will thus be seen the Physicians below are getting Diabetic practice out of all proportion to the average, which means Physicians using this treatment, both in Cities and Towns, are getting results that are sending patients from a wide range. After you have put one or two in comfort with mild internal treatment that does not have to be continued indefinitely you will begin to have calls from other Diabetics as the following orders prove:-

ILL (pop 1200)		ORE (pop 3000)		WEST VA (pop 1100)		TEXAS (pop 3000)		PENN (pop 1000)		CALIF (pop 1600)	
Sep	\$6.30	Jul	\$6.30	Mch	\$12.60	Aug	\$6.30	Mch	\$6.30	Jan	\$6.30
Nov	6.30	Sep	12.60	May	12.60	Sep	6.30	May	12.60	Mch	6.30
Apl	12.60	Nov	12.60	Jun	25.20	Dec	6.30	Aug	12.60	May	6.30
Jun	6.30	Dec	12.60	Jul	25.20	Dec	6.30	Jun	12.60	Jul	12.60
Aug	6.30	Feb	12.60	Aug	25.20	Feb	6.30	Jul	12.60	Sep	12.60
Nov	6.30	Mch	12.60	Oct	12.60	Feb	6.30	Dec	12.60	Nov	6.30
Sep	6.30	Mch	12.60	Dec	18.90	Apl	12.60	Feb	12.60	Jan	6.30
Jan	12.60	Apl	12.60	Jan	18.90	Jun	12.60	Apl	12.60	May	12.60
Jul	12.60	Jul	6.30	Apl	12.60	Aug	12.60	Aug	12.60	Aug	6.30
Nov	12.60	Oct	12.60	Jun	18.90	Nov	12.60	Dec	12.60	May	12.60
Jan	12.60	Jan	6.30	Sep	18.90	Dec	12.60	Feb	12.60	Jul	12.60
Mch	6.30	Apl	12.60	Dec	25.20	May	12.60	Apl	12.60	Sep	6.30
Apl	6.30	May	6.30	Feb	37.80	Oct	12.60	May	12.60	Oct	12.60
	<u>\$113.40</u>		<u>\$138.60</u>	Sep	18.90		<u>\$126.00</u>	Aug	12.60	Feb	6.30
				(*)	31.50			(*)	63.00	Mch	6.30
					<u>\$315.00</u>				<u>\$233.00</u>		<u>\$132.30</u>

CALIF		NEW YORK		MICH		WIS		NEW YORK		PENN	
Nov	\$6.30	Oct	\$12.60	Sep	\$6.30	Sep	\$6.30	Jan	\$6.30	Oct	\$6.30
Jan	12.60	Dec	12.60	Nov	12.60	Dec	6.30	Mch	12.60	Dec	6.30
Mch	12.60	Feb	6.30	Dec	12.60	Dec	6.30	May	12.60	Jan	12.60
Aug	12.60	Mch	6.30	Feb	12.60	May	6.30	Dec	12.60	Mch	12.60
Nov	12.60	May	12.60	Apl	12.60	May	6.30	Jan	12.60	May	12.60
Apl	12.60	Jul	12.60	Jun	12.60	May	6.30	Feb	31.50	Jun	12.60
Sep	12.60	Sep	12.60	Aug	12.60	Aug	6.30	May	25.20	Jul	12.60
Mch	12.60	Oct	12.60	Nov	12.60	Oct	12.60	Aug	25.20	Aug	12.60
Apl	18.90	Nov	12.60	Jan	12.60	Jan	12.60	Nov	25.20	Sep	12.60
Jun	18.90	Dec	12.60	Apl	25.20	Jun	12.60	Dec	25.20	Oct	12.60
Sep	25.20	Jan	12.60	Jul	25.20	Aug	12.60	Jan	25.20	Dec	12.60
Jan	18.90	Feb	12.60	Dec	25.20	Sep	12.60	Mch	25.20	Jan	12.60
Mar	37.40	Mch	12.60	Apl	25.20	Nov	12.60	Apl	50.40	Feb	12.60
May	18.90	Apl	12.60	Jul	50.40	Jan	12.60	Jun	25.20	Apr	12.60
Oct	18.90	Apl	12.60	Feb	50.40	Feb	12.60	Jul	50.40	May	12.60
Nov	25.20	May	12.60	Jun	50.40	Feb	12.60	Sep	50.40	Sep	12.60
Jan	12.60	Jun	12.60	Jan	50.40	Mch	12.60	Nov	50.40	Jan	12.60
Mch	12.60	Jul	12.60	Aug	50.40	Jun	12.60	Jan	50.40	Apl	12.60
Apl	12.60	Aug	12.60	Jan	12.60	Sep	37.80	Mch	50.40	Jul	12.60
Jun	12.60	Sep	12.60	Mch	12.60	Nov	37.80	May	50.40	Aug	12.60
(*)	<u>126.00</u>	(*)	<u>138.60</u>	Jul	<u>12.60</u>	(*)	<u>207.90</u>	(*)	<u>301.60</u>	(*)	<u>113.40</u>
	<u>\$447.10</u>		<u>\$378.00</u>		<u>\$507.70</u>		<u>\$415.80</u>		<u>\$919.00</u>		<u>\$352.80</u>

(*) No room to itemize.

Important Diabetic Practice in a City of 7000.

Physicians do not have to be in large cities to develop important Diabetic practice as the following orders from a physician in an Eastern city of 7000 population prove. Note the steady increase in the size of his orders:

\$ 6.30	\$25.20	\$50.40
12.60	25.20	50.40
12.60	25.20	50.40
12.60	25.20	50.40
12.60	50.40	50.40
31.50	25.20	50.40
25.20	50.40	50.40
<u>25.20</u>	<u>50.40</u>	<u>\$768.60</u>

On the estimated basis of one case of Diabetes per thousand of population there should be about ten cases of Diabetes in his city and environs, to be divided between fifteen local physicians. No one of them, likely, had more than two or three. At the average physicians' requirements in the use of this treatment the first four orders should have more than met this physician's wants for his share of the local cases, which means that he has already prescribed over \$600.00 worth of the Capsules for patients from a distance. And it is easily explained - when Diabetics learn there is a physician who is giving patients relief (reported by physicians all over the country) under INTERNAL TREATMENT THAT IS PAINLESS, HAS NO DANGEROUS REACTIONS and DOES NOT HAVE TO BE CONTINUED INDEFINITELY, the mere mention of the physician's name and location makes a hundred mile visit no obstacle to patients on starvation diets, needle injections, etc. without hope of cessation or relief.

If this physician had been told he was going to buy \$1000.00 worth of the Diabetic Capsules he would probably have said something more forcible than elegant, but he has already had over \$700.00 worth and that, too, in a city in which there were, probably, not a dozen Diabetics.

He was a diabetic himself and was taking serum injections three times a day. He stopped the injections and put himself on this treatment and became sugar free and put patients on it with same results. And from the sudden development of his Diabetic practice it appears patients all over his part of the State are learning what he is doing and are profiting by it for his Diabetic practice has broken local limitations and is invading a wide range.

And in a West Virginia town of but 1100, in which there would ordinarily be but one Diabetic, one of the two local physicians was treating two cases without any thought of other practice in this direction. He ordered for both. Both responded and then Diabetics began to flow to him from the outside and he has had over \$300.00 worth of the Diabetic Capsules.

A Penn. Physician, whose account is also running to hundreds, and who also writes, "I cut off injections at once on giving the Capsules" has gotten such results he has thought seriously about specializing in Diabetes. Location is no object when patients on starvation diets, painful injections, etc. learn you put them in comfort with mild, internal treatment. Physicians who have learned how definitely they can now control sugar and symptoms are attracting Diabetic practice out of all proportion to the limitations of their environments and Physicians of all Schools are awaking to the new field of practice this situation is developing.

(An important consideration is that as this treatment has no dangerous reactions and is in capsules and mailable, in simple Diabetes Mellitus without gangrene or acidosis after the first personal visit by patients from a distance the doctor can finish many cases by mail.)

There are Towns in which one Physician is treating several times as many Diabetics as the local population represents. For instance

IN THIS TOWN OF 2400

at one case of Diabetes per thousand of population there should be approximately three cases, in this instance to be divided between the four local Physicians - less than one each. On the estimated basis of \$8.00 to \$10.00 prescribed per case this Physician's wants would ordinarily be limited to a comparatively few dollars but here are his orders to the date this was written:-

6.30	12.60	12.60	12.60
6.30	12.60	12.60	12.60
12.60	12.60	12.60	12.60
12.60	12.60	12.60	12.60
12.60	12.60	12.60	37.80
12.60	12.60	12.60	37.80
12.60	12.60	12.60	<u>\$378.00</u>

It will be seen he has probably treated something over 40 cases, many times the number of cases the population represents, meaning, as we have shown over and over, that Physicians using this treatment, whether in Cities or Villages, are attracting Diabetic practice out of all proportion to their environments. And here is another in the same category:

IN THIS TOWN OF 1100

in which there is ordinarily but one case, the Physician happened to have two Diabetics under his care. He sent for a demonstrating quantity and put both on it. Both responded and Diabetics from elsewhere were attracted, as his orders to date attest, viz:

12.60	25.20	12.60	37.80
12.60	12.60	18.90	18.90
25.20	18.90	18.90	31.50
25.20	18.90	25.20	<u>\$315.00</u>

At an average requirement of \$8.00 to \$10.00 per case, it will be seen he has probably treated something like 30 cases, ten to twenty times as much Diabetic practice as a town of 1100 would ordinarily support.

AND IN THIS TOWN OF 1000

the local Physician, who is closely following the above experiences, wrote on one of his recent orders - "I have built up a clientele in Diabetes," The idea of building up "a clientele in Diabetes" in a town of 1000 seems ridiculous but we are using his own words and his orders and checks being matters of record are unimpeachable. His orders to date follow:

6.30	12.60	12.60	12.60
12.60	12.60	12.60	12.60
12.60	12.60	12.60	12.60
12.60	12.60	12.60	12.60
12.60	12.60	12.60	(*)25.20
			<u>\$258.30</u>

And such experiences are not limited to small towns. In an interior City of less than 10,000, ordinarily involving probably ten cases to be divided among the dozen local Physicians, one of them has already prescribed over \$900.00 worth of this treatment and his cases are probably crowding the hundred mark.

(*) No room to itemize.

What Physicians in Small Towns are Doing.

Based on mortality reports there is probably one case of Diabetes per 1000 of population and the physician in a town of 1000 to 2000 is likely to say "There are no Diabetics here." And that is commonly true. Hence, the demand for this treatment from physicians in small places puzzled us at first but experience disclosed that most of the cases treated are not local but are drawn from other places. The treatment of Diabetes has been more or less hopeless. But after the physician has put one or two local cases in comfort his Diabetic practice widens to adjoining towns, as is proved by accounts like the following:

For instance, here is a little town in Missouri	\$6.30	12.60	\$ 6.30
having but 200 people. It does not look like there would	12.60	12.60	6.30
be a single case there but here are this doctor's orders;-	12.60	12.60	
	12.60	12.60	\$107.10

And we would not expect a case in this Iowa town of	\$6.30	12.60	6.30
350 but the local physician has prescribed as follows;-	6.30	12.60	12.60
	12.60	12.60	
	6.30	12.60	\$100.80

In this Calif. town of 1600 the physician put a member	\$6.30	12.60	12.60
of his family on it, got the usual results, then prescribed	12.60	12.60	12.60
as follows;-	12.60	12.60	12.60
	12.60	12.60	\$132.30

In this N.Y. town of 1600 where we would expect but	\$6.30	12.60	12.60
two cases the physician has prescribed to date;-	12.60	12.60	12.60
	12.60	12.60	12.60
	12.60	12.60	\$132.30

This town in Penna. is not in Druggists' Directory,	\$6.30	12.60	12.60
apparently not sufficient business to justify a drug	12.60	12.60	12.60
store, but the local physician has prescribed;-	6.30	12.60	12.60
	6.30	12.60	
		12.60	\$132.30

In this town of 1100 that ought ordinarily show but	\$12.60	12.60	25.20
one case of Diabetes the local physician's orders show he	12.60	18.90	25.20
is treating many from other places, viz;-	25.20	18.90	37.80
	25.20	12.60	25.20
	25.20	18.90	\$296.10

Note how the size of this physician's orders increased	\$6.30	18.90	37.80
in this Penn. city of 4000;-	6.30	37.80	37.80
	12.60	37.80	\$195.30

Here is another Penna. city in which the physician's	\$6.30	12.60	25.20
account is itemized to show how his Diabetic practice	12.60	18.90	25.20
developed;-	12.60	18.90	25.20
	12.60	18.90	\$189.00

In this town of 2200 in Ill. the doctor who writes	\$12.60	12.60	6.30
"Am having good success" has prescribed;-	12.60	12.60	6.30
	12.60	6.30	
	12.60	6.30	\$100.80

None of these accounts could possibly be true if the physicians were not actually giving the patients the relief they are reporting from all over the country.

Reports on 50 Cases of Diabetes

Epitomizing the results Physicians are reporting under the thirty-day trial treatments of UVURSIN capsules we are now demonstrating to the Physicians of America.

We expect the demonstrations to reduce sugar and symptoms 20 to 40% but it will be noted that the reports often record the complete disappearance of the sugar during the demonstrations, results extremely gratifying to both Physicians and patients.

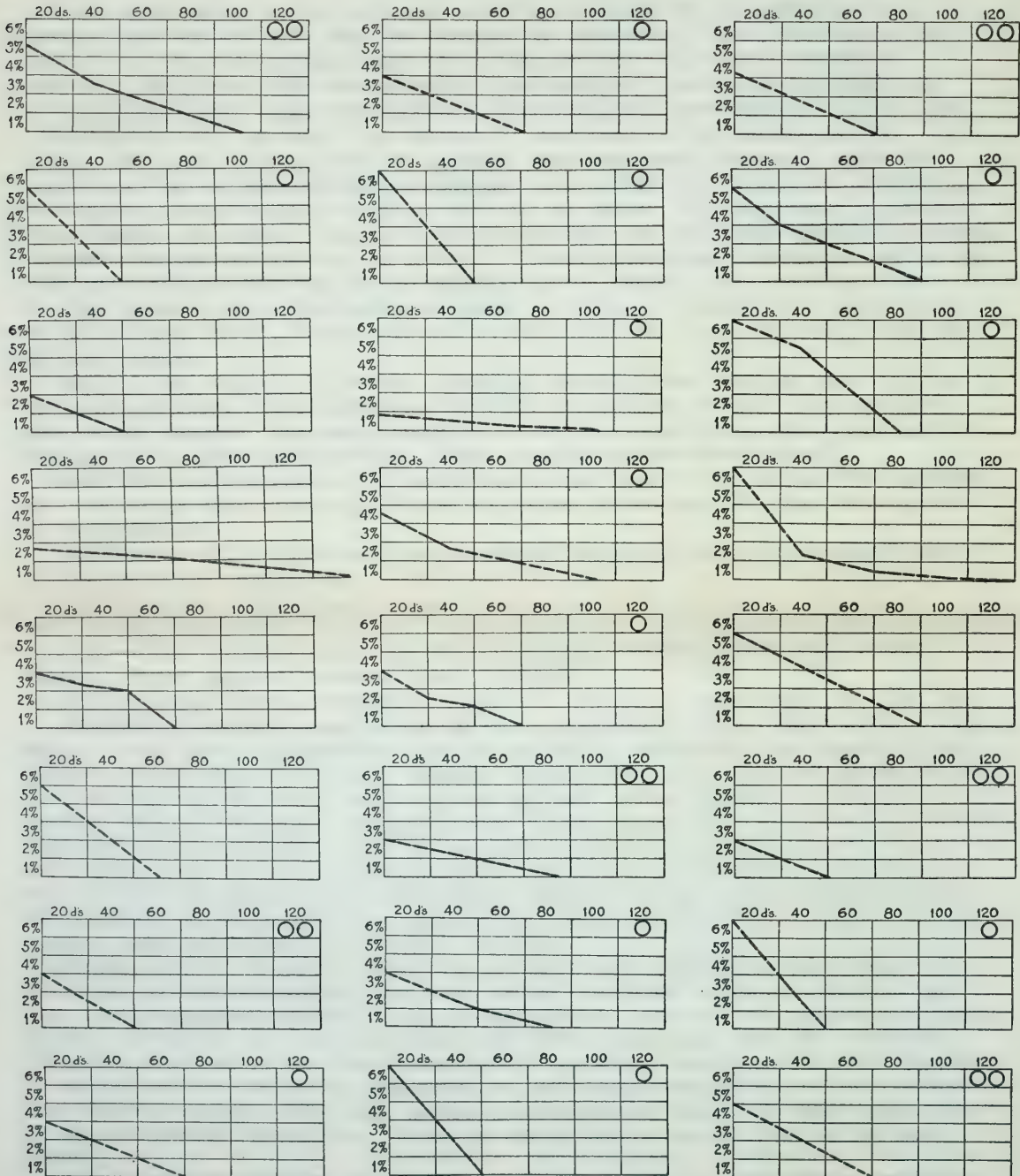
If half the reports are true (we have hundreds) the reduction of sugar in Diabetes by internal treatment is now an established fact—a fact vital to every Physician treating Diabetes, as evidenced by epitomes of the results in fifty cases, viz. :—

- PENNA. —Sugar disappeared fourth week of the demonstration.
- CALIF. —"Complete loss of sugar" third week of demonstration.
- MAINE —Sugar (heavy) lessening 14th day, sugar free 20th day of demonstration.
- N. Y. —Sugar 6%, was less than 1% the 21st day of demonstration.
- MO. —Sugar disappeared during demonstration, patient feeling better every way.
- ILL. —Diabetic gangrene, semi coma. Sugar disappeared 3rd week, general improvement.
- MASS. —Excessive thirst, polyuria and sugar disappeared during demonstration.
- CONN. —"Have finished 30-day demonstration and am sugar free."
- IOWA —Sugar drops 60% first 30 days (30 days later sugar free).
- N. Y. —Sugar 6.4% became "fractional" (40 days later sugar free).
- MO. —Sugar four plus disappeared during the demonstration.
- MO. —Sugar quickly disappeared—"Should be known to all the world."
- KANS. —Demonstration not quite concluded—"Practically sugar free."
- KANS. —No sugar last test, much better in every way.
- NEBR. —Sugar free first time in years and feels better than for years.
- WIS. —Case transferred from injections, sugar disappeared during demonstration.
- ORE. —Case transferred from injections, sugar disappeared first 21 days.
- TEXAS —Diabetic gangrene—"nearly sugar free, feet better."
- TEXAS —"Fifty per cent better than for four years."
- ILL. —Diabetic gangrene, sugar persistent. Sugar free the 20th day.
- OHIO —16th day sugar reduced to trace, condition continually improving.
- MO. —"No sugar present after first week." "Fine."
- FLA. —Transferred from injections—"It is all you said for it."
- N. Y. —Sugar (quite heavy) disappeared during demonstration.
- ILL. —Sugar (and albumen) disappeared during demonstration. Much improved.
- OHIO —Sugar reduced more than half and feeling much better.
- PENNA. —Diabetic gangrene—sugar disappeared during demonstration.
- CALIF. —No sugar after the 20th day of the treatment.
- IOWA —Case transferred from injections; 50% better.
- FLOR. —"Intractable case;" Sugar disappeared 15th day, gaining weight.
- N. Y. —"Sugar came down from 4% to negative" during the demonstration.
- IOWA —Transferred from injections—"Loaded with sugar"—"Practically none the 19th day."
- FLOR. —Diabetic, "very emaciated." "It did all you said it would."
- GA. —Charity case—"It worked such wonders will pay for it myself."
- MO. —My third order and good results in all so far.
- IND. —"They are doing the work and act so quickly," etc.
- N. J. —"I want to continue your wonderful capsules."
- PENNA. —"I am delighted. Check enclosed to continue."
- OHIO —"My wife's foot has healed. Sugar free."
- MO. —Sugar 3.45 with gangrene. "So improved that . . ."
- PENNA. —"No failures when the diet is held." (Has had over 20 cases.)
- PENNA. —Diabetic gangrene—Sugar free; check to continue.
- ILL. —Sugar free about the 15th day with improvement.
- N. J. —Sugar 11 grs. pr. fl. oz. dropped to trace 20th day.
- TEXAS —"My patient is improving rapidly."
- WIS. —"Patient in bad shape." "Now feels much better."
- KANS. —Sugar free 3rd week "and has remained so."
- ILL. —"On the treatment two weeks and much better."
- *MO. —Sugar 8% with gangrene—Sugar trace, gangrene healed.
- *N. J. —Sugar 5% with gangrene. Doing finely; can now walk.
- *KY. —"Critical." "Sugar trace, gangrene area healing rapidly."
- *IND. —Sugar heavy; heel sloughed off. "General improvement. Gangrene checked."

Above reports were written on cash orders to continue treatment.

*Cases required 60 to 90 days treatment.

Charts illustrating reports made by Physicians in 24 cases of DIABETES to show comparatively the number of days that elapsed between the beginning of the treatment and the elimination of the sugar.



- This sign in upper right hand corners designates cases in which the patient was a member of the Physician's family.
- In cases bearing this sign the Physician himself was the patient.

The bottom line in each block means complete elimination of the sugar, or so attenuated it was referred to as a trace.

In cases requiring over sixty days to eliminate the sugar it is our belief that in most of these cases deviation from the diet was the deterring factor.



SOME 30 DAY RESULTS

While a majority of the reports recording elimination of sugar show the average time was 60 to 70 days we present the following, taken from some late reports, to show how quickly some cases respond when the diet is strictly observed. In these cases particularly the treatment should be continued one to two months after sugar and symptoms disappear, the last month in half doses.

WISCONSIN - On the 16th I was called to see Mrs. B. (Diabetic) age 57; fleshy, had lost 30 lbs. last two months. Was very weak, nervous, mouth dry, tongue heavily coated and like sand-paper; was really in a frightful condition. Urinalysis showed 70 grams sugar to 100 cc. of urine. Had her under injections three times a day until I received your capsules. At this time urinalysis showed 7 grams of sugar per 100 cc. of urine. I discontinued the injections and in its stead gave the patient two of the capsules three times a day. At this date (20 days later) urine shows entire absence of sugar. Patient is looking fine, has gained some flesh, feels well and is delighted and I am enclosing check for another supply.

OREGON - Dr. writes - "I have a Diabetic seventy-five years of age. I have him on injections. Want something that can be given by mouth." The Doctor's next letter reports "The sugar disappeared in less than three weeks, patient feeling fine. Have another case. Check herein for two treatments."

CALIFORNIA - This Physician, reporting on his first case, writes "The patient has been doing well - no sugar since the first of the month." (The 20th day of the treatment.)

CALIFORNIA - This Physician also reported "complete loss of the sugar" the third week of the treatment.

PENNSYLVANIA - This Physician reports the sugar disappearance the fourth week of the treatment.

IOWA - Case 1: Sugar drops 60% first 30 days. 30 days later sugar free. Case 2: Sugar started downward first 10 days.

MAINE - Sugar (heavy) noticeably lessened 14th day. Sugar free the 20th day.

ILLINOIS - Diabetic Gangrene in extremis reported by Major, Med. Corps, U.S.A., who got such results personally that he decided to resort to this agent at what appears to have been a critical moment. Twenty days later came the first report.

"Patient, age 60, three weeks ago was in semi coma. Had lost 60 lbs. in weight, pulse so rapid and irregular could hardly count it; sugar 5%; S.G. 1038; many small localized skin areas of gangrene and two on right foot 1x2 inches with infection. These were dressed with moist alkaline depleting solution and your Rx with cardiac Rx given internally. Result: sugar gone; urine neutral; skin healing rapidly; infection cleared up; mind clear, and he is feeling almost normal. Sounds foolish as a 3 weeks' result."

Second report - (a month later) "As to that very serious Diabetic case, he lost much of the covering of the lower end of the tibia inside the ankle. As soon as the gangrene showed a line of demarkation I removed the gangrenous tissue, keeping the ankle in a moist dressing and on the first day that the wound was bacteria free started ox blood dressings to encourage healing. The foot is nearly healed and the patient is beginning to get around and will go to his country home for the summer. Have been giving a subcutaneous injection every other day of $1\frac{1}{2}$ grs. Sodium Cacodylate. I see no reason why he cannot live on for many years."

This treatment is giving Physicians a distinct advantage over those whose resources are limited to old measures.

REPORT OF THE

THE FIRST REPORT OF THE COMMISSIONER OF THE LAND OFFICE, MADE TO THE HOUSE OF REPRESENTATIVES, IN THE YEAR 1831.

ALBANY: PUBLISHED BY J. B. ALLEN, AT THE OFFICE OF THE COMMISSIONER, IN THE YEAR 1831.

THE SECOND REPORT OF THE COMMISSIONER OF THE LAND OFFICE, MADE TO THE HOUSE OF REPRESENTATIVES, IN THE YEAR 1832.

ALBANY: PUBLISHED BY J. B. ALLEN, AT THE OFFICE OF THE COMMISSIONER, IN THE YEAR 1832.

MORE 30 DAY REPORTS

As said elsewhere, the reports often show 60 to 70 days were required to eliminate sugar but here are some more 30 day reports that show how quickly some cases respond when the diet is strictly held. But the treatment should be continued one to two months after sugar disappears to prevent early return.

MISSOURI - Physician writes, "I am treating three cases over 45. Would like to try something besides the needle if I can get results." We sent 30 day demonstration for one case.

Report - "Sugar has practically disappeared. In fact, last five days there has been no sugar. x x x Patient feels better in every way. Find draft enclosed for 54 days treatment. Get this to me at once."

MISSOURI - Dr. writes, "I have two cases of Diabetes in men over 45. Send your free demonstration." Thirty day course was sent.

Report - "I am more than pleased with the treatment; my patient was sugar 4 plus and in five days he was sugar free. Send 54 day treatment. Check enclosed."

FLORIDA - Dr. writes, "I have a patient over 45 to whom I have been giving injections for some time, but does not respond as I would like, is very emaciated. I would like to try your treatment." We sent a 30 day demonstration.

Report - "The treatment you sent me has done all you said it would and I am very much pleased. Am enclosing check for the 54 day course. Send out at very earliest convenience."

GEORGIA - Dr. writes, "How about a free demonstration for a case over 50 with Diabetic Gangrene, woman, unable to pay for medical attention." Was sent the usual 30 day demonstration.

Report - "Send by mail collect 54 day treatment. It is a charity case but your free treatment has worked such wonders I am going to pay for it myself."

KANSAS - Dr. reports a Diabetic over 70 he has been treating about 9 years. Sent 30 day demonstration.

Report - "About 6 weeks ago she collapsed; heart action bad, mitral murmur, broken compensation, difficult breathing, general weakness, sugar plenty. I put her to bed. On receipt of capsules, prescribed them with my treatment for the general symptoms. She is much better in every way. No sugar last test. Check enclosed for the 54 day treatment."

NEBRASKA - "Am treating a woman age 52 with lots of sugar, and a few others, but want to demonstrate on this one." Sent 30 day demonstration.

Report - The capsules were given with VERY good results. Is sugar free for first time in years and says she feels better than she has for years. Enclosed is check for which send the Diabetic Capsules."

TEXAS - "I have Diabetic on my list, 63. Has had suppuration of several toes. Have him on protein diet and injections. Would like to receive a trial of your capsules." Sent 30 day course.

Report - 60 days later - "Find check for another supply. Patient was nearly sugar free, feet better. Used up the sample course. Now has much sugar and feet worse. Get the capsules out at first opportunity." (Another illustration that it is poor policy to drop the treatment the first month even if sugar and symptoms seem to have disappeared.)

TEXAS - "Am treating Diabetic age 49. Has taken many injections. Would like a trial." Sent 30 day demonstration.

Report - "She is 50% better than she has been for 4 years. Thanks. Find check for 54 days treatment. Please rush as we are almost out."

SOME RECENT ORDERS - AND WHY.

ILLINOIS

This Physician wires, "Am treating a Diabetic aged 70. Has gangrene of toe, sugar persistent. Send literature and demonstration via air mail." We sent the usual 30 day demonstration.

Report - "Received the demonstration and gave the patient two of the three packages of capsules. She is sugar free. (20th day-J.J.F.Co.) Enclosed find check for full course for another Diabetic. Am very grateful to you for sending the demonstration. Looking forward to more orders in the future."

OHIO

Dr. writes, "My wife, 52, is suffering from Diabetes, is much opposed to the hypo and dreads the injections. If your capsules are as claimed we will be glad to give them a trial." 30 day dem. was sent.

30 days later Dr. writes, "She began using the capsules on the first and the fourth day began to show improvement. The 16th day a slight trace of sugar, her condition continually improving. We now feel with the aid of the capsules and diet that in a few weeks we are going to have wonderful results." Enclosed check to continue.

INDIANA

Dr. writes - "I am treating a Diabetic age 52. Please send the treatment at once as this is a good case for such a trial. Let me hear by return mail." The usual 30 day demonstration went forward.

2 weeks later - "Find check herein for a treatment for another patient."

30 days later - "Find check enclosed for another treatment. They are doing the work - coming from all sides. This treatment acts so promptly I am getting interested."

ILLINOIS

Dr. writes, "I am treating a Diabetic 47 years of age. I would like to have you send a trial supply and your literature. Please rush."

24 days later - "Thanks for the sample you sent me. Am quite pleased with the results I am getting. Am enclosing check for another order and will order more as soon as these are gone. Rush".

PENNSYLVANIA

Dr. writes, "I am treating five cases of Diabetes all over 45 years old. Would like to know all about your capsules." We sent the literature and 30 day demonstration for one patient.

20 days later Dr. wrote - "I am delighted with the Diabetic treatment and am enclosing check for a half doz. boxes of the Diabetic capsules."

INDIANA

With his first order for Diabetic treatment this Physician writes.

"This is for myself. I am with the _____ Hospital."

8 mos. later came his second order as follows: "Find check enclosed for another course of the Diabetic treatment. I ordered a treatment in November which resulted in an apparent cure but about 30 days ago I went on a vacation and ate everything in sight and some of the symptoms have returned and I think I should take another course."

(In half a dozen places in our literature we advise against dropping the treatment immediately upon abatement of sugar and symptoms. J.J.F. Co.)

NEW JERSEY

Physician writes, "I have a case of Diabetes over 45 (myself)."

We sent the usual 30 day demonstration.

6 mos. later - "Send another course of your wonderful Capsules. I got some good results in my own case and I want to continue." Another case in which sugar and symptoms were probably practically eliminated by the demonstration and the treatment dropped.)

How Long Should The Treatment be Continued.

In patients over 45 who live to the diet and instructions the usual experience records the sugar and specific gravity beginning to decrease the 10th to 20th days and shortly thereafter (frequently before), the polyuria, thirst, pruritis or emaciation, as the case may be, beginning to diminish. (Frequently this is reversed, the patient beginning to feel better before sugar shows much response.)

While two treatments (of $\frac{1}{2}$ dz. each) often eliminate the sugar (frequently the first half dozen accomplishes this result), from a study of the accounts and correspondence with physicians in nearly all the States who are prescribing this treatment, it appears that many patients lose fear and discontinue as soon as they are comfortable. The day this was written we received a Penna. Physician's order for his ninth treatment with the statement that his last patient, a hospital case, was again doing her own work and wanted to discontinue although she had not finished the first course. These cases are often back in the physician's hands, frequently in a few months, "as bad as ever." Experience shows that the best preparation against recurring sugar and symptoms is to continue the treatment in the first instance for two to three months after the physician records the complete disappearance of sugar and symptoms, taking the last month in half doses.

In this connection, it gives us pleasure to say that in patients who were under the influence of the treatment two to three months after the elimination of the sugar and symptoms, recurring symptoms in a number of cases, years thereafter, were reported as yielding to brief recourse of two to three weeks of the treatment. The death in this City recently of a capitalist in whose case the sugar was eliminated in the first instance over twenty years ago is a case in point. Patient was at his office daily up to the day of his passing, which was caused by cardiac asthma. Several times during the twenty years short courses of the Diabetic agent were resorted to to control recurring symptoms.

In a similar case reported from Montana the sugar was eliminated 16 years ago. Patient at 75 was still living in July, 1927. "Sweets in the diet caused sugar to return several times but return to the diet with his let-up on the sweets restored the usual condition of health."

As a contrast to the above two local cases in both of which the sugar was eliminated over 10 years ago report no return of sugar up to date.

In cases involving gangrene, while the sugar, polyuria, etc. appear to respond as usual, the gangrenous lesions frequently do not begin to show signs of response until the sugar is nearly nil. Hence patience is very necessary when this symptom is in evidence. (Some helpful suggestions as to the local treatment of this symptom will be found among the reports on the first page of the brochure herein.

In all cases painful or troublesome symptoms may be prescribed for just as if this agent was not being given. Where the patient is merely on diet the treatment is usually given alone. If there is constipation or hepatic sluggishness it is well to keep the liver and bowels comfortably functioning. Sugar Xs may commence the 10th to 14th days with the expectation, in most cases, that the sugar and specific gravity are beginning to show the first signs of modification.

and the other two patients were discharged.

The patient who was discharged on the 10th of June was a woman, 45 years of age, who had been ill for about a year. She had been in the hospital for about a year and had been treated with various drugs. She was discharged on the 10th of June and was well at the time of writing.

The patient who was discharged on the 15th of June was a man, 35 years of age, who had been ill for about a year. He had been in the hospital for about a year and had been treated with various drugs. He was discharged on the 15th of June and was well at the time of writing.

The patient who was discharged on the 20th of June was a woman, 30 years of age, who had been ill for about a year. She had been in the hospital for about a year and had been treated with various drugs. She was discharged on the 20th of June and was well at the time of writing.

The patient who was discharged on the 25th of June was a man, 40 years of age, who had been ill for about a year. He had been in the hospital for about a year and had been treated with various drugs. He was discharged on the 25th of June and was well at the time of writing.

The patient who was discharged on the 30th of June was a woman, 25 years of age, who had been ill for about a year. She had been in the hospital for about a year and had been treated with various drugs. She was discharged on the 30th of June and was well at the time of writing.

The patient who was discharged on the 5th of July was a man, 30 years of age, who had been ill for about a year. He had been in the hospital for about a year and had been treated with various drugs. He was discharged on the 5th of July and was well at the time of writing.

SOME "UP TO THE MINUTE" REPORTS.

KANSAS

"Have female Diabetic; on injections 2 years; is now totally blind. Would like to relieve her of the injections." Sent 30 day demonstration. Report - "She is doing as well or better than on injections. Sugar has reduced. Check herein to continue."

MISSOURI

Physician asks demonstration to get away from injections. Report - "Sugar has practically disappeared" and he orders for another case. He closes a later order thus - "I believe this is my third order and good results in all cases."

IOWA

Dr. writes, "Am 51. Have had Diabetes 2 years. Am on injections. If you have something that will get away from injections I would like to try it." Sent 30 day demonstration. Report - "I am 50% better since taking the treatment." Enclosed check for another course.

FLORIDA

"I gave the trial treatment to a very intractable case of Diabetes with very gratifying results. Gain in weight and sugar free after about the 14th day. Duplicate quickly. I have several cases of Diabetes under my care."

MISSOURI

Dr. who is himself a Diabetic asks for demonstration. He wrote, "I am intensely interested and will co-operate with you to the uttermost if results warrant." In his report, 23 days later, he stated the sugar which "had been running for 2 years" had disappeared. He writes to order for a patient and does not disguise his surprise, closing "Should be known to all the world."

IDAHO

"I am unable to find a trace of sugar. This is the second case I claim to have cured with your treatment." "I know of no case cured with injections."

NEW YORK

Patient showed "improvement first week." "Sugar disappeared during the demonstration. Five weeks later still free and I am widening the diet." "This was a chronic case of years standing."

PENNSYLVANIA

Dr. writes, "I received the trial treatment for Diabetes and had most wonderful results. Check herein for a treatment."

MISSISSIPPI

Dr. writes on his order for another treatment, "It did my sister, who is a Diabetic, more good than anything I have been able to get hold of."

CHICAGO

"The trial treatment worked like a charm. Enclosed is check for 54 day course."

CHICAGO

Female 44, case of 7 years standing, sugar 2.7%. Sugar and albumen disappeared during the demonstration. Condition much improved. S.G. 1019. Order to continue.

PENNSYLVANIA

The demonstration reduced the sugar 50 per cent.

WASHINGTON

Dr. writes, "Several years ago I suffered a severe attack of glycosuria. Your treatment took care of my troubles. This A.M. I discovered it was returning. Send treatment air-mail C.O.D."

The first of these is the fact that the

Journal of the American Medical Association

[illegible][illegible][illegible]

JOHN J. FULTON CO.
88 First Street
San Francisco, Calif.

Dear Doctor:

Physicians are reporting favorable reactions in Diabetes in over four-fifths of the cases, as will be seen from the current literature herewith.

The administration is simple. Where patient is merely on diet this treatment is given alone, although it may be aided by symptomatic treatment for painful or troublesome objective symptoms. And in all cases in which there is constipation or hepatic sluggishness it is well to keep the liver and bowels comfortably functioning.

If the patient is over 45 and lives to the diet and instructions and takes the treatment faithfully, you will not have the common experience if you do not between the 10th and 20th days find the sugar and specific gravity beginning to decrease, and shortly thereafter (frequently before) note that the polyuria, thirst, pruritis or emaciation as the case may be is beginning to diminish. (Frequently this is reversed, the patient beginning to feel better before sugar shows much response).

While two treatments often eliminate sugar (frequently the first accomplishes this result) it cannot be too strongly impressed that experience shows it is important to continue the treatment one to two months after sugar and symptoms disappear, taking the last month in half doses.

These capsules are not stocked, but are sent by parcel post, prepaid at \$6.30 per half dozen (54 days treatment). You will find it intensely gratifying to get results in cases that "have gone the rounds" and did not get a reaction till they reached you.

Yours very truly,
JOHN J. FULTON CO.

An interesting feature of the correspondence is the increasing number of physicians who put two patients on the treatment and in due course reported both as responding, for instance:

IOWA

"I divided the Diabetic agent between two patients—case one, Mrs. S—sugar was 2.83%, thirst is gone, elimination nearly normal in quantity, gain in weight 11 pounds. Two examinations by highly competent pathologists now show no trace of sugar.

Case two, Judge———. Excretion was 126 ounces, sugar 4 per cent. On the thirtieth day total urine was 74 ounces, sugar 1.4%, gain in weight 2 pounds.

ILLINOIS

This Physician ordered for two cases Diabetes. With his third order he reports—"I am getting splendid results. Both cases (females) were practically invalids and are now up doing as much work as ever and gaining in flesh. But on standing a few hours test gets a slight trace of sugar, hence check for two more treatments."

NEW YORK

Physician divided his first treatment between three patients. A little over 30 days later he re-ordered stating that all were getting fine results. 40 days thereafter his third order reported the practical recovery of all three and that he was starting a new patient. Two of the patients had been on injections for several years.

WEST VIRGINIA

This physician put 4 Diabetics on this agent.

40 days later—First advices on the four cases as follows:

Mrs. H—, age 55. "Very anemic, had given up in despair when she came to me." Sugar drops 80%, polyuria and thirst greatly reduced, pain has disappeared, marked improvement and patient again doing her own house work.

Mrs. T—, age 52. Sugar 3% drops to a trace, polyuria much less, burning relieved and patient much stronger, pains almost gone.

Mrs. D—, age 44. Sugar and polyuria reduced over half, patient's strength much improved.

Mrs. B—, age 47. Sugar has disappeared, polyuria about normal and strength much improved.

"I am delighted with the results so far. It is bringing me business. Only one thing wrong—you are so far away. I have two more cases impatiently waiting last order."

ILLINOIS

Dr. writes with 3rd order, "Having very good results—three cases under treatment. The first is sugar free, s.g. 1020."

MICHIGAN

Dr. writes—"I have three cases of Diabetes and am prescribing the Diabetic Agent. Must say I am getting very good results."

MINNESOTA

The first case male (56) has gained 15 pounds, sugar reduced to a trace. Codein, etc., had failed.

Second case—(50) was in a bad way—high sugar, frequent urination, great loss of weight. All cardinal symptoms are abating. Has gained 8 pounds and prognosis now favorable.

INDIANA

Dr. writes, "I have two Diabetics, heavy with sugar (over 6 per cent) excessive polyuria and thirst, heavy loss in weight and very weak."

First Report—Sugar reduced 50 per cent in one case and nearly 60 per cent in the other, polyuria half in both cases, thirst scarcely any in one case and much improved in the other. Both are much stronger and have gained in weight five and thirty pounds respectively—great improvement. We wrote asking if he did not mean three instead of thirty pounds gained in case two. The Doctor replied "I mean to say he has gained thirty pounds, not three—great improvement."

Third Report—thirst virtually gone, less polyuria, sugar much less S. G. 1026 and 1028 respectively.

Fourth Report—Case one improvement continues, patient two is at work.

NORTH DAKOTA

Physician writes from a Hospital of which he is in charge, stating that a brother and sister have inherited Diabetes, one of 5 years and the other of 12 years development.

60 days later—both report progress with reorder in each case.

Later—The Doctor reports both improved and orders for a new case.

CALIFORNIA

Patient (Physician age 45) passing 2½ quarts with varying sugar, usual weakness, etc.

24 days later—"I am improving but not as fast as I wish. Sugar now steady at a trace. I loaned one of the units to a patient of mine. Her progress has been marvelous, so wish to place her on a full treatment—check for same herein."

MISSOURI

Sent the treatment to this physician for a case of Diabetes in his family. He got such results he promptly ordered for another patient.

Second Report—The two cases of Diabetes have improved so much they are out of my hands. (The Dr. enclosed orders for 2 more patients).

MICHIGAN

Physician, State Med. Ex'r. for large Fraternal Organization, reports—"Have started the third Diabetic case and now on the third unit with decided improvement. The two old patients continue to improve. Rush duplicates for all three."

IOWA

Physician holding a chair in the faculty of an Eastern Medical College in a letter asking a question closed—"I have used the Diabetic preparation in two cases in my practice with practically complete results and have recommended it to fellow practitioners who have also been successful."

CALIFORNIA

The patient from Taft went back feeling fine, pain gone, urine cleared up. Tests proved normal. Another put on the Diabetic Rx was in today; all traces of sugar gone.

FLORIDA

"In both cases (Diabetes) it acted fine—yet one discontinued as soon as good results were obtained and now I hear is as bad as ever. Check herein for another course, rush."

MISSOURI

Both physician and parent under treatment for Diabetes. He got such results in his own case that he prescribed it for his parent, later reporting the disappearance of the sugar with corresponding physical improvement.

OHIO

"Am using your Diabetic Rx with success and satisfaction. Have cured several and benefited all. Would like to specialize in stomach and kidney but can't get away from general practice."

ILLINOIS

Diab.—"Both sugar and albumen went to a trace and patient began to gain from the alarming muscle shrinkage. Feeling well enough to avoid expense she went without treatment over a month. . . . The test now shows sugar in abundance, S. G. 1030. Am putting her on it again, order enclosed."

Later—As to the case (male aet. 60) that I think is cured of Diabetes, will make assurance doubly sure with another course—so duplicate last bill.

COLORADO

"I have used your preparation with good results. . . . Practically all have been helped. What I want to know is whether they lose efficacy after prolonged use." (We have known of cases in which the only effect seemed to be amelioration of symptoms in which it was taken off and on for several years with continued results. In a typical case the report was "Do not feel nearly so well without it."—The following from an Oregon physician also answers above—"My own father has used the Diab. Rx for the last 10 yrs. and while it has not cured him it has prolonged his life and made him comfortable altho he does not live right.")

NEW YORK

Army Surgeon age 45. "Discharged as permanently and totally disabled by Diabetes Mellitus."

Later the Dr. reported sugar decreasing and stronger in every way with complete disappearance of the Neuritis. But feeling that the improvement was due to the Allen diet he stopped the treatment and continued the diet. Exactly one week later he wrote—"I commenced to feel badly again with reappearance of the Neuritis." This caused the Dr. to decide his improvement was due to the treatment as he writes with his reorder. He adds "have also prescribed quite successfully."

CALIFORNIA

My son 12 has Diab. s.g. 1040. "I understand Diab. in children is hard to manage."

20 days later—"No change."

20 days later—"S. G. has dropped to 1030. I put another Diabetic on it and he is improving. Check herein for further treatment for both." (Again regret to say we have small confidence as to the permanence of the improvement shown in cases of children or very young patients.—J. J. F. Co.)

It will be seen the folder summarizing results is so crowded with reports there is no more room and it is impractical to enlarge it as it already contains more matter than Physicians have time to read. Hence, we are unable to present even epitomes of the Professional reports that are accumulating. For instance, the following will show the very interesting character of reports arriving after the close of the demonstration.

ILLINOIS

Doctor writes - "I am one of the physicians who gave your treatment a try-out several years ago and have been practically immune until recently. There is now a severe recurrence, s.g. 1030 up every hour at night. Where is the nearest point to obtain another course?"

(Our record shows that in 1918 the Doctor eliminated the sugar and symptoms in his own case and shortly thereafter put another Diabetic on the treatment with like results.)

Later - "When I last wrote you I was struggling with a spec. grav. that would not budge and a sugar content that was annoying. When half through with the second course it came to normalcy and I have been fine since."

ILLINOIS

Doctor writes, "I have had Diabetes over three years. Send 54 day treatment".

First report - Dr. in reordering wrote he was drinking "large quantities of milk," As the improvement was slow he discontinued the milk (milk is prohibited-J.J.F.Co.) and then got "very gratifying results" and now states "am very much encouraged."

Second report - "The result is very gratifying. My tolerance for carbohydrates has greatly increased - so much so that I got no sugar reaction except once last eight days and then it disappeared in three hours. Check herein for Treatment for two relatives both of whom have large quantities of sugar."

ILLINOIS

Dr. writes, "Am 64, have had Diabetes 2 yrs.

1st report - Improvement in all symptoms.

2nd report - This morning am sugar free, s.g. 1020. Better in every way.

3rd report 2 months later - Progressing nicely. Am indulging some starch and canned fruit without any evidence of sugar. No thirst or polyuria, s.g. 1020. Check for reorder.

ILLINOIS

Dr. wrote previously he had three cases on the treatment with good results.

A rush reorder closes, "I have a case of 20 years standing, just finishing the third Rx; sugar content reduced to about one per cent and gaining in every way. Greatly pleased and so am I."

TEXAS

C.O.D., rush, for a patient with Diabetes needing the treatment badly.

2 months later - Patient doing nicely. Sugar disappeared 20th day. Polyuria reduced half, C.O.D. another course.

IOWA

Doctor writes - "Check herein for 54 day treatment for patient, age 60, with Diabetic Gangrene.

Later - Dr. reorders reporting - "Patient had an ulcer on left foot for 3 yrs., and three ulcers on right foot for 6 mos., a piece of bone an inch long sloughing behind the small toe. All ulcers healed, patient still on treatment."

KANSAS

"Send C.O.D. 54 day treatment for Diabetes."

Report - "Send another. My patient is sugar free today but I think I had better give him another treatment." (It is important to continue the treatment 1 to 2 mos. after sugar and symptoms have disappeared, the last month in half doses.)

1. Myocardial neuritis & cardiitis in the course of an epidemic neuritis - a review showing a question of how far these cases are the Diabetic preparation in two cases in my practice with practically complete results

Announcing a revolutionary innocuous herbal agent that so decisively reduces albumen and symptoms in Bright's Disease, that to give the Medical Profession a practical demonstration we inaugurated the most comprehensive and convincing program we could conceive of, viz.: we tried to reach every Physician in America having Bright's Disease himself or in his family. Proposals offering the demonstration were mailed to the Physicians listed in the American Medical Directory.

It seemed reasonable to assume that no Physician having Bright's Disease himself or in his family would send several thousand miles for further measures, who had not already exhausted the local prescription counters, and that therefore the only response would be from cases that were chronic or had resisted treatment, and as a rule would seem impossible. It was under these difficult conditions that the offers, over 140,000, went forward.

The impossible cannot happen even once, hence we felt a hundred demonstrations in Bright's Disease would be sufficient, but did not suspend till nearly three times that number had applied. To be accurate two hundred and ninety-eight Physicians asked for the demonstration, many reporting the chronic form, some reporting dropsy, others that convulsions were in evidence, and some advising that they had tried nearly everything else without results.

All were served. From these we have had nearly 300 reports. Some withheld their results, and again others sent several reports recording the progressive stages. It will be seen that they overwhelmingly attest the ability of this agent (for Rationale see fourth page) to reduce albumen and symptoms in Bright's Disease, over four-fifths reporting the usual response to the treatment. Under such adverse conditions, the vital fact that four-fifths of the

reports could show favorable reactions seemed so improbable that we had the accuracy of the epitomes of the first hundred officially certified and deposited the original reports and the entire correspondence, involving hundreds of letters, in Wells Fargo's Safe Deposit Vaults in this City, as a permanent record of the results herein reported. Results per hundred are results per thousand, and are now simply cumulative.

We only invited reports during the demonstration, anticipating that after the reaction had started, and the albuminous waste was seen to be decreasing and symptoms softening, Physicians would continue thereafter as necessary. Hence many of the reports only cover the first month or so. As to character and permanence of results see fourth page for some cases in which albumen and symptoms were eliminated from five to twenty years ago, the patients still being about and active at last addresses.

And we call particular attention to the fact that both acute and chronic forms were reported as yielding, the term "chronic" apparently being no longer a bar where there is a fair heart and recuperative power. And what is also impressive is the fact that a number of the recoveries reported were in cases so extreme that tapping was required. One writer of National reputation goes back nearly 30 years to find a case of Bright's Disease in which recovery was reported after tapping. In view of this fact the writer asked a Specialist in Renal diseases, who had reported a number of recoveries in which he had to tap from two to twenty times, if he had ever seen a patient recover after tapping under any other treatment. He replied that he had not.

From nearly 300 reports, less than one-fifth of which state there were no results, we select the following as of particular interest. In those marked †† the Physician was the patient, † a member of his family, † a patient.

Vice Pres. State Med. Assn. †††

Age 63, Nephritis, S. G. 1010, large quantities pale urine. Duration several years. Virility almost nil. Polyuria interfering with rest.

30 days later—"S. G. today is 1020 and for two nights now have had to get up but once. Not only feel better, but the virility is now all that could be reasonably asked. When our State Med. Assn. meets I shall tell them in a paper that will be heard over this State.

30 days later—"Am holding my own in all respects including virility. Have had my druggist stock up and am prescribing it with marked success."

Later—"Still improving. Am prescribing with gratifying results. Am preparing to specialize in Kidney with the Comp. for the next anchor."

Later—"S. G. now 1025, no thirst or other of the symptoms, virility what it should be. You may give my name to any Dr. who wishes to write."

Illinois †††

Physician, age 50, Major, Medical Corps, U. S. A., Chronic Interstitial Nephritis.

First Report—"The alb. has decreased before, but have found it but twice since beginning your treatment. It seems to be very soothing to the genito urinary tract. The blood pressure which was 187 systolic 2 months ago is now 160. Would like to see the case again." (We are sending another 60-day course to that end.)

Second Report—"I found fruit acids brought back large traces of albumen. I turned to castor oil, with an alkaline water. The Compound then produced immediate results and there is now no albumen; pus and blood cells are less; casts are decreasing and am feeling much better. I am prescribing."

Third Report—"Am continuing to make satisfactory progress. Albumen is rarely found now."

Ohio ††

Physician writes, "It has been a pleasure to use your treatment in a number of cases with most gratifying results. Among my cases my father-in-law owes his life (acute Bright's Disease) with his order for the third treatment he wrote, 'Albumen has dropped 75%. All symptoms have disappeared. Rx 1 is wonderful and I will always use it. You will hear from me again.'"

A Physician in a small place in New Jersey wrote for a demonstration, patient 28, alb. 4%, s. g. 1005. With his order for the third treatment he wrote, "Albumen has dropped 75%. All symptoms have disappeared. Rx 1 is wonderful and I will always use it. You will hear from me again." (We are sending another 60-day course to that end.)

New Jersey †

A Physician in a small place in New Jersey wrote for a demonstration, patient 28, alb. 4%, s. g. 1005. With his order for the third treatment he wrote, "Albumen has dropped 75%. All symptoms have disappeared. Rx 1 is wonderful and I will always use it. You will hear from me again." (We are sending another 60-day course to that end.)

West Virginia ††

Dr. writes—"My wife 3 yrs. ago had Chronic Nephritis, carrying 40% alb. After taking one doz. of Rx the alb. entirely disappeared and she remained perfectly well until last week when headache set in, and upon examination found considerable alb. again so started her on it at once. Send half doz. by express."

Ohio †††

Doctor writes "Am 60 and have had albuminuria 3 years. Alb. 4% and vesical getting bad. If as represented will be delighted to use it."

40 days later—"No urinalysis yet but I am feeling much better."

Missouri ††

Age 23, albumen 9.2%, spec. grav. 1006, casts numerous, oedema, 19 months duration.

One month later the Doctor noted "marked improvement in patient's general condition" and in due course reported following albuminous changes:—

	Initial	Albumen	9.2%
2nd Test	..	5.5%	
3rd Test	..	2.8%	
4th Test	..	1.4%	
5th Test	..	1.0%	
6th Test	..	0.6%	
7th Test	..	0.5%	
Final Test	..	none	

The Doctor wrote that the improvement the first month was out of all proportion to the albumen and that the rapid decline in the albumen thereafter was especially interesting. "The only other treatment was Blands Pills one t. i. d. with regulated diet."

Final Report, 30 days later—"Today there is not a trace of albumen and the condition of the patient has gone along with the improvement in the percentage. I consider this a perfectly marvelous recovery. Your preparation is head and shoulders above anything I have ever seen. I want to thank you for your cooperation in furnishing a thorough clinical demonstration and I shall lose no opportunity to cite this case to my colleagues."

Later—"Since reporting the last case of Nephritis I have had another remarkable reduction under Comp. One. Will report this and some other cases in the future. Send literature to Dr. S. I was showing him some of our case histories and he is much interested."

Minnesota †††

Dr. writes—"My own case—Two diagnoses (1) Diab. Insipidus (2) Interstitial Nephritis. S. G. as low as 1000 at times, both hyaline and granular casts. No alb., no sug. (On the theory of Nephritis we wrote we believed he would get results under Rx One.)"

There was an unusually quick response the Dr. reporting that following the first unit he began sleeping better and the s. g. was improved."

Second Report—Gradual improvement in every way. S. G. at times reaching 1020 to 1022. Fine vigor.

Third Report—"Last tests negative in every way." The Dr. writing that he was prescribing.

Pittsburg †

Dr. reports on a case of "sub-acute Nephritis." "Female age 32. Employed the usual Materia Medica and as a last resort gave Comp. Albumen has left, uric acid headaches and nervous symptoms have disappeared. Has gained 30 lbs., and is living comfortably. Am anxious to use it further and am writing for prices."

California †

Dr. writes—"Two years ago I had a case of Cardio Vascular Renal disease in which I used the Rx for Bright's Disease. Tho I lost my case from Influenza I was so favorably impressed by its good work that now I wish to try it in my own case. What is the nearest point to me where it can be had."

Arkansas †††

Surgeon writes, "Have been suffering with acute Bright's for nearly a year, lately some blood and sugar. Am on saltless and sugar free diet."

35 days later—Alb. drops three-fourths, casts have disappeared, uremic and general conditions improved except blood in urine is still present. About out of the treatment, anxious to continue.

Massachusetts ††

"I have a boy (19) seriously ill with acute Nephritis. Alb. 55% (bulk). Dropsical distention very excessive. Am wondering if your treatment will help."

30 days later—"I believe he is improving. Albumen reduced about 5%. Oedema is lessening, but is still great. Patient is in a very serious condition but I feel a little encouraged."

20 days later—"The patient is just beginning to show improvement that seems to be of an encouraging nature."

30 days later—"I am happy to be able to say the patient is wonderfully well. Until three weeks ago improvement was small, but since then a wondrous change has come about and I am firmly convinced that ultimate recovery is not too much to be hoped for. Later I will give more of the real facts."

90 days later—"I want to thank you for the most unexpected and thoroughly satisfactory results. His was the most desperate case of acute Nephritis I ever came in contact with that recovered. In bed 3 months, albumen 55%, casts of all descriptions, total 24 hours urine 1 to 2 ounces, oedema frightful. All efforts were of no avail. In desperation I saw the patient in your advertisement and had the slightest faith, but I have quite the contrary feeling now. Patient is now working, strong, good flesh, and feels perfectly well, urine 50 to 55 ounces. The daily routine is a real good living, with the Compound (1) in an effort to get rid of the remaining 1½% of albumen. The microscope now shows nothing pathological."

West Virginia †

Female—age 57—Bright's Disease (contracted kidney) 6 grms. per liter with casts and some blood, violent headaches, muscular twitches.

First Report—"Alb. reduced one-third, pains, muscular twitches about gone."

Second Report—Alb. 4 grms. pr liter but sugar is now showing.

Third Report—Alb. 1½ grms., sugar increasing altho she seems better and stronger.

Fourth Report—Alb. 1 grm.—sug. continues to increase.

Fifth Report—Considerable improvement since last report. Sugar that was abundant has disappeared. Alb. 1 grm., pus and blood none. S. G. 1020. General health good and sleeping well.

Texas ††

Doctor writes: "My wife has a bad case of Bright's, advanced stage, albumen 20 to 25%, advanced dropsy, no appetite, most every form of treatment has failed."

This brief statement made the case look critical to us, our feeling being that oedema covering entire body often indicates extremis, and we wrote a month later as to the results. Receiving no report we feared he had not received it in time to get a reaction. However some months later the Doctor re-ordered and reported as follows: "I used the Compound in her case with the greatest satisfaction and gratifying results. The albumen disappeared and the case cleared up. She fully recovered her usual health."

Arkansas †††

I am the patient, age 58, alb. ½ of 1%, blood pressure 175, some vertigo.

60 days later—Decrease in alb. 75% and 20 points drop in blood pressure.

60 days later—"I am very glad to state I am better than when I wrote you last. Have gained 5 lbs. Send another course, O.O.D."

Wisconsin †††

Am suffering with Chronic Bright's S. G. 1010, alb. 5%.

First Report—"Albumen has decreased over half and I feel quite a bit better. Have ordered a further supply."

South Dakota †

Bright's. Extreme case; nearly moribund; age 70; albumen at times nearly solid, casts, urine scant, dropsy extreme (bowels and legs).

30 days later—"Improvement slight but still hope."

30 days later—"Patient slowing gaining. 50 days later—"Dropsy is nearly gone. Was on bed rest for a long time but is walking freely about the house. No abnormal urine constituents, good color and quantity about normal. Blood pressure at one time 200 is nearly normal, and in all he is in fair shape. He was almost moribund when put on the treatment. The patient, a highly respected citizen, (had been the rounds, 6 or 7 doctors.) is more grateful than I can tell you. Still on Comp. 1 with 4 Anasarcine tablets daily and a morning saline."

Ohio †

Physician wired to San Francisco, suggesting urgency. Alb. 3%, marked oedema, intermittent heart.

40 days later—"S. G. 1018, Alb. none. Oedema none, heart quite regular. Cleared up rapidly, on your treatment. Will use it from now on."

Alabama †††

The Doctor wired to San Francisco for Comp One due to the following—"About one-half of my urine coagulates on heat and acid test."

First Report—"I have been on the treatment for a month and albumen has disappeared. How long do you advise continuation?" Ans.—from two to three mos., last month on half doses.

But the Dr. suspended. Later he wrote "the alb. returned when I stopped. C. O. D. ½ dozen."

Later—"Dr.'s wife writes he passed away before the order arrived. Consulting physician confirms cause as apoplexy due to Chronic Bright's."

Missouri †

A St. Louis Physician prescribed the Renal Agent for a brother Physician with albuminuric Retinitis, age 58, alb. ½ of 1%, S. G. 1014. Hyaline casts, expressing the hope that it would do more for the patient "than the treatment he has been taking."

35 days later—"S. G. 1018, alb. trace, casts none, gaining in weight."

90 days later—Improvement continues; duplicate.

Massachusetts ††

Dr.'s son, 18 yrs. old, alb. 1½%, 7 yrs. standing, during severe acute attacks urine solid in the glass. Some dropsy. If it helps you'll hear from me often. Fifth week—conditions improving, marked decrease in alb. (half) and still decreasing. This is the only thing I have ever found that decreased the alb. and am encouraged. Dup. with bill.

New York ††

Female—"Bright's S. G. 1004. Alb. 2%. Casts, etc. If successful will use in all my cases."

1 mo. later—"We asked for report writing 'if you are getting the usual results, you should now find the albumen decreasing. Reply—"Getting the usual results, G.O.D. 1 doz."

West Virginia ††

Male—Albumen 5%. 40 days later—"At the end of the first half of the treatment—"The patient has gained 5 lbs. and albumen has reduced to a mere trace. I feel sure when he has taken it balance he will be free from the disease. I thank you and will prescribe."

Wisconsin †††

Female—Bright's 4 yrs., S. G. 1003, Alb. 4%, general dropsy—unable to relieve her.

First Report—"Am pleased to report marked improvement—S. G. 1014, Alb. 2 per cent."

Kentucky

Reported by a physician who controlled critical symptoms in his case of Chronic Bright's and now has several patients on the treatment.

1—A farmer, 68, low, s.g. with alb. and "passing almost pure blue" had to alter it before I could examine it. The first four weeks showed no result. The next two showed first signs of improvement. At the last ex. 10 days ago blue had stopped, s.g. 10.0, no alb., much improvement in weight, strength and spirits. Without my previous experience would not have had much faith in his recovery. I consider this case remarkable.

"Female—apparently a complete recovery."
"I have seen others improving I will report on."

North Carolina

A physician in North Carolina who reports his experience with this agent "running over a number of years" has been "universally satisfactory" writes he now has Chronic Interstitial Nephritis himself with large trace of albumen, both hyaline and granular casts, blood and crescentic kidneys and no diastolic. He asks whether Comp. One should help or hinder his blood pressure.

As dropsy, common in these cases, is due to excessive blood pressure forcing the thin aqueous constituents of the blood thru the veins and cell walls into the tissues, and commonly responds to this agent it follows that the modification of abnormal blood pressure in these cases is not only a logical sequence but automatically attends the declining dropsy. (In mild cases the dropsy frequently responds to this agent without purgation but when it is excessive or obstinate it is the safest plan to use the Renal agent with the natural heart action active measures such cases call for.—J. J. F. Co.)

St. Louis

I have been turned down by several Insurance Companies. Albumen 2%.
Three mos. later—"No question about its value in Bright's Disease. Am now using it in every case needing an aphrodisiac. No failures so far. That is remarkable." We wrote asking if he meant that he was prescribing it in cases calling for aphrodisiacs but whether due to albumen drain or not. The Doctor replies—"Every case—independent of Bright's Disease—that's exactly what I mean." (Although this preparation contains no aphrodisiacs, see formulae under the various why it acts as an aphrodisiac, as in this and the case immediately preceding, will be found in the Rationale on fourth page.)

Pennsylvania

Have a case of Bright's Disease showing a large amount of albumen, am anxious to try it on.
60 ds later—Tests show decided decrease in albumen but symptoms seem to yield. Check for another course.

Pennsylvania

Have been looking for just such a preparation. Please send Rx 1.
30 ds later—"Alb. less, S.G. 1020 (was 1012). Blood pressure 140 (was 160), heart condition slightly improved—case shows slow gradual improvement."

Nebraska

Patient, relative, 58, alb. 5½%, s.g. 1006.
60 ds later—"Patient much better, alb. cut to a trace, s.g. practically normal and general condition much improved. Am continuing the treatment."

Los Angeles

Am much interested in your preparations. I prescribed Rx 1 for a patient and in the short time it was administered we saw very encouraging results. Send late literature. May take it myself.

Massachusetts

Physician asks for the treatment for a case of albuminuria, closing, "I desire to give the treatment a thorough trial."
60 days later—"Patient is improving. Send further supply."

Missouri

Reporting on a case of "severe acute Nephritis," alb. 9% with dropsy and anemia in which alb. and symptoms were eliminated after the Renal Comp. nearly a year. The Doctor now writes that the urine remains clear.

Pittsburg

Alb. 10%; S.G. 1012. If it does me good will prescribe.
80 ds later—"Have not been on a strict diet, am hard worked and must eat. However alb. has decreased about half; s.g. 1019; on third bottle Rx 1."

Detroit

First Report—Albumen 5% (promvent).
Second—"Nil" with general improvement.
"Am attending to practice without the nervous, listless feeling of a year ago."

Boston

Bright's—"Dropsy from head to foot." Albumen not stated. Third month dropsical effusion disappeared. "Was surprised. Have practiced 40 years."

Texas

Bright's Disease. Patient 9 year old girl—the Doctor does not disclose the % of albumen—simply reporting "most pleasing results."

California

First Report—Albumen 2%—"constant."
90 days later—Albumen trace—with decided improvement.
"This case has been going on since the Spanish War and was pronounced hopeless by Dr. S. a friend of mine. The change is remarkable and I will admit I did not expect it. Should it be permanent it will be almost unbelievable. I would rather pay for myself than have him stop taking it."

Chicago

Hearing that a Chicago Physician had a long distance professional call to treat a critical case of Bright's Disease we were particularly interested in knowing the circumstances and the outcome. From an extensive report we received the following:

"Am glad to state that I did go all that distance on a professional call. Was called by wire as the case had been pronounced hopeless by five Physicians. On arrival proceeded direct to the hospital. The patient had been in the hospital six weeks, was carried in unconscious and failed to respond to treatment further than to regain consciousness. Had not been able to lie down or recline on either side. Twenty-four hour urine ten quarts, one pint. Constant nausea, impaired vision, oedema very extensive from head to feet, the usual picture of a so-called "hopeless" case. Patient about thirty years of age. The two doctors in charge "hoped I would not change the treatment (Nux & Perm) as it was only a case of a 'few days,' and a change might hasten death. I took full charge of the case giving maximum doses of the Renal agent, aiding with other measures and lost no time. The patient's improvement within 24 hours. At end of week the doctors could hardly believe it, so they took blood pressure and examined the eyes, the patient having stated that improved vision had been in the hospital. The first changes he noticed."

"The patient weighed more than 165 pounds; this was weight at end of two weeks' treatment when I first dared to have him moved on the scales. When we got the water weight of him (without tapping) he weighed 139 pounds."

"After six weeks' treatment he had him removed. He was dressed and able to help himself, though he was not permitted to try to walk. In spite of bad weather he continued to improve and was able to walk into the hotel and has continuously improved since. The case had 50% of albumen and as low as ten ounces of urine. When taken from the hospital the case still showed 3% of albumen. The physician showed no albumen and the quantity of urine normal. He is doing business in New York City today (two years later.—J. J. F. Co.). He looks as well as he ever did and says he never felt better. Am taking no medicine in this case. He is still using Compound and keeping a restricted diet as to meat. I want to thank you for getting your literature into my hands and I am passing it on to those not too "iron-clad" to recognize its usefulness."

Shanghai

An American physician enjoying an important practice in Shanghai, China, reports good results in a number of cases of Bright's Disease in all of which the prognoses were bad. In one member of a wealthy family, who had been in the hands of the best European physicians in Shanghai. In bed a year. Heart seriously involved. Pulse 160. Usual albumen and heavy casts. Oedema excessive. He put her on the Renal Comp. (Rx 1) with salines. The third week the albumen and casts reduced to a trace, the oedema had disappeared and shortly thereafter patient was out of bed. The Doctor had had 6 cases without a failure. He used him to add—"These are better results than reported in your Bulletin." (The Doctor asked what the practice is as to continuance of the treatment after the albumen has been taken up. The matter experienced advice continued for two to three months, the last month in half doses.—J. J. F. Co.)

(This physician's interest in this treatment was due to the fact that a relative was in bed critically ill with Bright's and when put on the treatment by the physician in charge, the latter had exhausted the usual resources and considered an early fatality inevitable. Within 30 days there was a reaction and a few months later patient returned to the business, passing away 16 years later due to acute return of the disease. Several times within the 16 years the albumen returned and was on each occasion reduced by a course of the Renal Rx, which caused the physician to have this agent stocked in Shanghai.)

Texas

Report on 3 cases—all critical—"The young lady (15) is doing well—no oedema—eyes at right—no pain over heart or kidney. Albumen still continues with a few casts. Her immense improvement all around has attracted great attention as the family is well-known, connected with one of our former United States Senators."

Second case—broken down with dissipation, swollen from head to foot—retinitis, etc., too far gone—succeeded.
Third case—improving rapidly. Oedema now entirely gone and all other symptoms much improved. Am pretty well convinced it is the remedy."

New Jersey

Chronic Nephritis for over 10 years.
June 11, S.G. 1008, Alb. 7%, casts numerous.

Aug. 10, S. G. 1014, Alb. 5%, casts few.
"There have been variations in the albumen—due to the nervous condition but the condition as a whole is improving. The albumen having disappeared and but few casts now appearing."

Connecticut

"Am pleased to report am improving. The Alb. has disappeared the dropsy. Cystitis is better—urine clearing." The Dr.'s first letter was written in pencil "on a slip of trembling." The last was written with pen.

Pennsylvania

Girl 17, Alb. 5%. losing weight etc.
1st Report—"Patient has moved—there report she appears better."

Kentucky

Physician writes—"Excuse stationery as my little girl is writing at my dictation. Am at home with Bright's Disease. Have not been in my office for over a year. Will be glad to try your treatment." (History shows uremic convulsions.)

40 days later—"The quantity of urine has not decreased any but the inflammatory process seems to be abating, the albumen has reduced and the terrible rigor pains are not so severe or often. On his whole I feel I am improving. (The copious urine, blood casts, and helplessness of the patient disclosed by the correspondence, suggested contracted kidney, one of the most refractory forms of Chronic Interstitial Nephritis, and we sent a second half dozen in the hope that it would begin to reduce the excessive urine blood and casts, and awaited the second report with unusual interest.)

Second Report—40 days later—"Would have answered before but was waiting to treat the patient. I was willing to admit that I am improved. My urine is considerably improved. It has cleared up and is not over half the quantity. Very few casts, if any at all. Albumen is less than 3 per cent; S. G. 1015. The patient has about left me."

Third Report—"Improving nicely—weight, strength and spirits much improved; can walk 6 to 8 squares, stomach nearly normal again, headaches about subsided, eyes much better, can eat most anything, albumen less, casts disappearing, no uremic convulsions since taking the Compound." (The Doctor is now out again and writes from down town for the first time.)

Fourth Report—"Still improving; S. G. 1017, alb. 2%, casts less; pain almost entirely gone and gaining weight and strength. Have 20 days more of the second treatment and believe by that time will be relieved."
Fifth Report—"Still improving—have gained 15 lbs. in 35 days."

Sixth Report—"From a long, final report we quote—"Think I'm about well. S. G. 1016, alb. trace; heart sound; sleep well; ravenous appetite; in active practice going when and where I please. Will write you about some interesting cases I have."

The Dr. later reported several cases of Bright's yielding including one extremely serious case.

Colorado

This physician (63 years of age) Surgeon for a large Colorado Corporation, writes "I am using your Bright's Disease Compound, averaging about 4 per cent of albumen. Has been in active practice 39 years. Haven't had a day's vacation for four years so it was about time for something to set in."

On the 1st day I had to go slow on account of my stomach but now I can take three full doses a day and the albumen has diminished to almost none at all. Some days no trace of it. Then, possibly a slight trace for a day or two but never generally therefore am much encouraged."

Vermont

Female—Albuminuria, age 43, bloats a little, headaches, digestive disturbance, with loss of strength.

First Report—"Patient is doing well: Albumen cut to 2 qts. in 24 hrs. and has been at times, and she is stronger and doing well generally."

Second Report—"Patient doing finely, is stronger and bloats has ceased."

Pennsylvania

Bright's Disease of long standing with complication of a very large gall bladder, for cholecystectomy. Following the first three weeks of the treatment without giving the albumen index, the physician reports—a decided change has taken place in my physical condition. I am able to explain the improvement and acknowledgment he adds—"I wanted to be sure where to give credit before making a positive statement."

Milwaukee

Bright's Disease with ascites—Albumen 3%.

Second Report—"Is improving." Albumen 2%.

Third Report—"If she improves like the last month, I have hopes she will get well."

Massachusetts

Chronic Bright's, age 58, S. G. 1010, Alb. 15%, quantity 2 qts. in 24 hrs. Had lost 25 lbs. and still losing, anemic, languid, wanted to lie down continually, generally miserable.

Four weeks later—"3rd day noted change for the better. S. G. 1015, Alb. 10%, 5%—have gained 12 lbs. and still gaining—good flesh too—wonderful improvement in strength and giving at least 12 hrs. daily to my practice. People remark the change. I consider it a wonderful change—almost beyond belief."

Month later—"Alb. 3%. Gaining in every way."

Massachusetts

"Discharged from S. Med. Reserve Corps for persistent albuminuria with casts."

2nd Report—"No time to make urinalysis (due to flu) but am feeling better."

Florida

Female. "Interstitial Nephritis, alb. heavy."

First Report—S. G. 1008, Alb. 1%.
Fourth Week—S. G. 1012, Alb. ½ of 1% "greatly improved."

Bright's; girl 16 years—"If it helps her will use it in my cases of Bright's."

First Report—Alb. 4%.

Final Report—Alb. "trace." "All symptoms better. She thinks she is cured. I expect to use this Comp. in all my severe cases."

Tennessee

In another case reported due to the definite character of the diagnosis, the physician writes as follows:

"I have a lady 68 who had been pronounced incurable at Johns Hopkins. I have the letter she brought from there stating she had mitral lesion with Chronic Bright's. The specific gravity was 1004, albumen continuous for months. Dyspnoea and heart so much involved I treated with digitalis and in less than a year I saw the albumen disappear and the specific gravity return to 1020 and since then she has been going any and everywhere. I may want some of the Renal Rx for myself if I can stay home long enough to take it."

Arkansas

Div. Surg. K. C. S. R. Co. reports on an employee—"I found a typical case of Chronic Interstitial Nephritis. On inquiring about the treatment at Johns Hopkins I have the letter she brought from there stating she had mitral lesion with Chronic Bright's. The specific gravity was 1004, albumen continuous for months. Dyspnoea and heart so much involved I treated with digitalis and in less than a year I saw the albumen disappear and the specific gravity return to 1020 and since then she has been going any and everywhere. I may want some of the Renal Rx for myself if I can stay home long enough to take it."

In a later report he wrote that thereafter he had given the patient repeated tests with happy results and closed with the observation that he might have something to say at the next meeting of the State Medical Society.

New Jersey

Chronic Bright's Disease S. G. 1005, Alb. 4%.

1st Report—Beginning to look hopeful.

2nd Report—"Alb. reduced to 1%; all symptoms have disappeared and patient is gaining in weight. You will hear from me six or eight days."

3rd Report—"My patient is getting along finely. Duplicate with last report."

4th Report—"Patient doing fine—duplicate again."

Minnesota

Referring to the results reported to him in an "aggravated case of Bright's Disease" this physician writes it is "suggested" to describe a case of Chronic Sanatogen kidney disease, using your methods of treatment. I write for full information with the idea of specializing in Bright's Disease, etc."

Wisconsin

"Nephritis since July, 1918. Alb. 5%. high blood pressure—have tried dieting and usual treatment."

Three weeks later—alb. is reduced to 3%. Excuse pencil but am busy plus because I feel better. (Asking Tinct Podophyllum and Pot. Citrate with it.)

Texas

Age 73. "S. G. 1008, Alb. over 20 per cent."

2nd Report—"Alb. 2 per cent. Skin getting more moist—feeling better." (As drop in the case of the Dr. writes he questions the accuracy of his own figures.)

3rd Report—"S. G. 1012 to 1015. Alb. less than 1%."

Mississippi

Nine letters from this physician report recoveries in "several cases of Bright's Disease" under the Renal agent, youngest 5 yrs., oldest 72 yrs., one of which was critical. In one of the letters he says "it is the only thing I have ever seen."

Virginia

"The results are quite satisfactory and in advance of my expectations. How permanent they are time must disclose. Mail further literature." (As to permanence, cases will be found on 4th page dating back 5 to 20 years.—J. J. F. Co.)

Missouri

This physician, Ex-official of the State Medical Association reports—"The Comp. seems to have removed all trace of albumen in my own case. Whether it will return I cannot say."

Ohio

Female. Alb. 3% with casts.

First Report—"Patient responded favorably, alb. decreasing, S. G. 1015, dropsy lessened. But a liver bile is interfering."

Second Report—"She is much better."

Massachusetts

"The decided improvement" shown the first day (very unusual.—J. J. F. Co.) in "a complicated case of Bright's with severe dropsy." The physician writes to report "all the information possible."

Montana

"Am getting good results in two very obstinate cases of Bright's Disease and general dropsy. I am very happy in attributing it for several years with satisfactory results."

California

"Bright's Disease of long standing." First Report—Albumen 2%—"Constant". 3 months later—Alb. 1%—"Patient is better."

Michigan

Dr.'s uncle, Albumen 2½%, heart involved. First Report—"14th day—the patient has improved to an appreciable extent."

Texas

"Using your preparations with uniform success. Give best price in quantity lots. I do my own dispensing."

Ohio

It is doing the work. Alb. 4% has dropped to ½ of 1% and has several patients on it with good results."

Texas

Male. Alb. 5% S. G. 1002.
First Report Albumen less, S. G. 1010, alb. I cannot get him to diet.

Kansas

"Duplicate last order. It seems to do the work."

We hand you RENAL DIGEST as requested.

We recently concluded a demonstration to the Physicians of America, the results of which must be of profound moment to all concerned directly or indirectly with Bright's Disease. We tried to reach every Physician in the United States having Bright's Disease himself or in his family. Nearly 300 responded, some involving dropsy and some reporting they had tried nearly everything else without results. All were served with a 54 day treatment. It will be seen that their reports, epitomized in the DIGEST, overwhelmingly attest the ability of this agent to reduce albumen and symptoms in Bright's Disease.

An interesting feature of the correspondence is the number of Physicians who put two patients on the treatment and reported both as responding. See sheet enclosed.

Note particularly the number of cases in the DIGEST in which tapping had been resorted to. The writer never knew of a recovery under any other treatment in a case requiring tapping.

The use of this treatment is simple. If the heart is affected or there is dropsy and the patient is taking the usual treatment to moderate those symptoms, it may simply be added. But where the patient is merely on diet, the Compound is taken alone. Where there is constipation, it is well to aid by keeping the liver and bowels comfortably acting.

Results may show a little the first week but usually between the tenth and twentieth days by decreasing albumen and a little later by gradual softening of the symptoms. Frequently this is reversed, patient beginning to feel better before the albumen shows much response.

Counselling patience and adherence to diet and careful living, and anticipating the usual results,

Yours very truly,

JOHN J. FULTON COMPANY

P.S. - Important retail drug stores in all large cities and the principal wholesale druggists thruout the country now carry this Compound. If for any reason you are not promptly supplied with this treatment (FULTON COMPOUND Rx 1) at \$1.50 per bottle, if you will write us we will give you the address of some nearby wholesaler who will supply your local druggist.

Most of those having Chronic Brights do not know anything can be done and many are resigned. As you begin to mend won't you kindly help us get this message before them by telling any you may know of this treatment? Or if you will send us the addresses we will mail the literature.

[illegible]

OF PARTICULAR INTEREST

were cases in which Physicians put two patients on the treatment both getting results. Reports showing similar results in both cases cumulatively attest the ability of this agent to reduce albumen and symptoms in Bright's Disease. For instance:-

CALIFORNIA - Dr. M's report on two critical cases involving tapping. (1), boy, 6 yrs. Dropsy obstinate requiring eight tapplings. (2), a mariner, albumen solid and dropsy so persistent twenty-one tapplings were required. Results were very slow but the Doctor ultimately reported recovery in both cases.

CALIFORNIA - Dr. P. in person reported several recoveries, his last being particularly interesting - involving retinitis, convulsions, albumen solid and dropsy requiring three tapplings, 34 lbs. of water being taken at first tapping. The Doctor reported patient's return to business the fifth month.

WASHINGTON - Dr. reports recoveries in two extreme cases. (1) Patient "at one time unconscious, totally blind with retinitis and looked upon as hopeless. It has helped me in 3 bad ones and I expect it to do so again". 90 days later albumen trace, sight returned and patient left for home. (2) Condition critical, albumen 12%, pulse 48, urine so bloody it clotted. Dropsy excessive, tapped three times taking 6, 9 and 6 quarts. Rush treatment." 70 days later - "albumen trace, patient going to work".

SHANGHAI - The Doctor reports six cases "without a failure". The last was in a critical condition. In bed a year. Pulse 160, albumen and heavy casts. Oedema excessive. The patient was at the steamer to see him off on his visit to America.

MISSOURI - The Physician after getting a recovery in the case of a relative (chronic Bright's Disease) commenced prescribing. Following is one of his subsequent letters. "I am sending you copy of urinalyses in three more cases; two are discharged. The other I expect to discharge soon; viz.-

Case 1 (W.H.)	First test alb.	3.2%	Final test	none.
Case 2 (W.B.)	" "	2.1%	" "	trace.
Case 3 (V.W.)	" "	1.6%	" "	none.

OHIO - "It is doing the work. Albumen 4% has dropped nearly 90% and have several patients on it with good results."

MONTANA - "Am getting good results in two very obstinate cases of Bright's and general dropsy. Have been prescribing it with satisfactory results."

WYOMING - Dr. after reporting recovery in his own case, writes, am also "prescribing it with marked success".

MISSOURI - Physician writes, "I have been using your treatment for Bright's Disease successfully for years both in my practice and in my family, having cured myself of Bright's".

IDAHO - Physician writes, "I have yet to see a case in which it has not done good".

neys) are only functioning properly when the diffusion of substances through

[illegible]

THE UNIVERSITY OF CHICAGO

1

ON CHARACTER AND PERMANENCE OF RESULTS

SOME WRITERS GO BACK 30 YEARS TO FIND A CASE OF BRIGHT'S DISEASE IN WHICH RECOVERY WAS REPORTED AFTER TAPPING. TO ACCENT THE NEW RESULTS NOTE THAT MANY CASES WERE SO CRITICAL AS TO REQUIRE TAPPING FROM TWO TO TWENTY TIMES.

(Dr. I. M. P. - patient G. W. K.) Albumen so heavy the tube solidified. Dropsy excessive. Had to be tapped twice, 34 lbs. of water being taken at first tapping. There was retinitis and case had reached the convulsion stage. Following the change of treatment to the Renal agent, with heart measures, albumen and dropsy gradually declined and eye sight returned. The fifth month Dr. P. reported the patient's recovery and return to business. This was in 1905. At last advices, 14 years later (1919) patient left for Oregon in his usual health.

(Dr. L. M.) Patient boy (A) had been tapped several times in a local hospital and was again filling rapidly. The house physician gave the family no encouragement and they decided to take the youth home. Dr. M. was called. Wounds made by the trocar in tapping had not healed when treatment was changed to include the Renal agent. Results were in doubt for three weeks requiring several more tapplings. Albumen then declined and dropsy diminished. Two months later the Physician reported the boy as normal. This was in 1911. The Doctor reported the boy at school at last advices in 1915.

(A. G. B.) Albumen heavy, nervous system depleted with partial paralysis, patient on crutches. Prognosis distinctly unfavorable when the treatment was changed to the Renal agent. Thereafter the weekly tests showed declining albumen with corresponding physical improvement. The albumen was finally eliminated and crutches discarded. This was previous to 1905. At last advices, over eighteen years later, (November, 1923) the patient (a druggist) strong and active, behind his counter as usual.

(H. W. W.) Bright's Disease with dropsy so excessive patient had to be tapped three times. Attending Physicians felt there was no hope but the Renal Compound was given. There was an unusually early response, reaction beginning within a few days. She did not have to be tapped thereafter and the third month was reported about her usual activities. This was in 1914. At last advices eight years later (1922) same report.

(R. C. P.) Patient, boy, age nine, usual albuminous and dropsical showing. Patient became so swollen a fatal termination seemed inevitable. The treatment was then changed to the Renal agent. Dropsy and albumen were eliminated in due course. Analyses by two independent Physicians confirmed the disappearance of the albumen and casts, normal s. g. 1022. The results appearing unreasonable, the youth was stripped and examined from head to foot, confirming the recovery. This was in September, 1902. November, 1923, twenty-one years later, patient is a robust, active business man on Battery Street in this City.

(Mrs. W. E. H.) Bright's Disease involving the usual albumen with dropsy. Dropsy became so excessive tapping was necessary to prolong the patient's life. Patient had been tapped three times and was again bloating when the Renal agent was given. Further tapping became unnecessary, the dropsy gradually yielding and some months later patient was about her usual avocations. This was in 1902. At last advices, sixteen years thereafter (1918) patient had remarried and was living in this City.

(R. M. W.) Patient, editor of a local magazine, albumen with the usual symptoms. Case resisted treatment and patient was sent South in the hope that the climate would help. Patient dropped 35 pounds in weight and was still declining when the Renal agent was resorted to. Case gradually responded weight and strength returned. This was in August, 1901. At this writing (November, 1923) twenty-two years later, the patient is at his desk in this City in his usual vigor, weight over 200 pounds.

THE PROGRESS OF THE WORK DURING THE YEAR 1900. The work of the year has been devoted to the study of the various forms of the verb in the different languages of the Indo-European family. The results of this study are given in the following chapters.

CHAPTER I. THE VERB IN THE INDO-EUROPEAN FAMILY. The verb is one of the most important parts of speech in all languages. It is the only part of speech which is found in all languages, and it is the only part of speech which is found in all languages in the same form.

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BLOOD PRESSURE IN BRIGHT'S DISEASE.

Physician, who has chronic Interstitial Nephritis, asks whether this Compound should help or hinder his blood pressure.

As dropsy, common in these cases, is due to excessive blood pressure forcing the thin aqueous constituents of the blood thru the veins and cell walls into the tissues, and has been shown to respond to this agent, it follows that declining blood pressure in these cases is not only a logical sequence but automatically follows declining dropsy, as shown by reports like the following:

SOUTH DAKOTA - Bright's, critical; nearly moribund; albumen heavy; dropsy extreme. Response slow but the Physician's 4th report showed normal as to albumen; dropsy nearly gone; blood pressure, at one time 200, reduced to normal.

PENNSYLVANIA - Physician reports on case Bright's, as follows: Albumen less; S.G. 1020 (was 1012); blood pressure 140, was 160; gradual improvement.

OREGON - Doctor writes, "Dropsy almost gone; blood pressure lower; ureamic conditions have disappeared; no albumen or casts for some time."

ARKANSAS - Physician reports decrease in albumen 75% and 20 points drop in blood pressure.

(Nothing is claimed for this preparation in high blood pressure caused by Arterio Sclerosis (hardening of the arteries) or from any cause except the abnormal blood pressure caused by inflamed kidneys resisting the movement of the blood thru them that is often met with in Bright's Disease.)

RETINITIS IN BRIGHT'S DISEASE.

In cases of Bright's Disease which have developed Albumenuric Retinitis (blindness or suddenly failing vision) some writers take a very hopeless view. But it will be seen from the following that this aspect also is reported to have yielded with the other symptoms and in some very hard cases. For instance:

CHICAGO - We condense this Physician's six page report to the following: Hospital case of Bright's Disease; albumen very heavy; dropsy from head to feet; constant nausea; impaired vision; 24 hours elimination but 10 oz.; "the usual picture of a so-called hopeless case." The patient had been in the hospital under treatment six weeks. Had been carried in unconscious and had failed to respond to treatment further than to regain consciousness when this Physician was called and on taking charge put the patient on maximum doses of Fulton Compound Rx 1 with other measures the symptoms called for. "At the end of the first week the improvement was so definite the hospital Physicians could hardly believe it so they took his blood pressure and examined his eyes, the patient having stated that improved vision and loss of nausea were the first changes he noticed." (Very unusual as improving vision within our experience comes much later. J.J.F.Co.) The dropsy disappeared without tapping; albumen disappeared; all symptoms yielded and patient was in business at last advices.

MISSISSIPPI - "69, albumen with Retinitis." Doctor writes - "So far nothing has helped." 60 ds. later - "Albumen trace, wonderfully improved in every respect. Can read newspapers again. Could not tell one person from another four feet away before beginning this treatment."

WASHINGTON - "The patient I wrote you about (blind, unconscious, albumen 7%, etc.) was in the office today. Little bile, that's all. Feeling better than for 10 years."

• FURTHER EVIDENCE OF TUMORING ACTION

With further work, it is hoped to determine the effect of the various

substances on the growth of the tumor and on the general health of the

animal. It is also hoped to determine the effect of the various

substances on the growth of the tumor and on the general health of the

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CASTS IN BRIGHT'S DISEASE AND NEPHRITIS

Realizing that the presence of casts in the urine in chronic Bright's Disease and Nephritis is generally considered as unfavorable to recovery we here group some reports in this class of cases recording the disappearance of the casts with the other symptoms:

ILLINOIS - Bright's Disease, critical; female, dropsy head to feet.

Laboratory reports, a week apart:

1st	S.G.	1032	Albumen	13%	Casts fair number
2nd	S.G.	1019	"	12%	Casts few
3rd	S.G.	1032	"	9 $\frac{1}{2}$ %	Casts moderate
4th	S.G.	1021	"	1 $\frac{1}{2}$ %	Casts none

7th Patient sitting up

MASSACHUSETTS - Male, 19, acute Nephritis; Alb. 53% (bulk); dropsy excessive; casts of all descriptions; in bed 8 mos.; all efforts of no avail. Third report - "A wondrous change has come and I look for recovery." Final report - "Patient is now working and feels perfectly well." xxx "The microscope now shows nothing pathological. His was the most desperate case I ever came in contact with that recovered."

MINNESOTA - Doctor writes - "My own case. S.G. as low as 1000 at times with both hyaline and granular casts." 2nd report - Gradual improvement in every way. 3rd report - "Last tests negative in every way. I am now prescribing it."

SOUTH DAKOTA - Case in extremis, bed-fast, nearly moribund. Age 70; Alb. at times nearly solid in the tube, with casts, scant urine, dropsy extreme. Final report - Patient is walking freely about the house; dropsy is nearly gone; urine good color, quantity about normal and no abnormal urine constituents.

KENTUCKY - Physician is the patient and wrote from his bed. Had not been to his office for a year. Usual albumen and casts with ureamic convulsions. Third report - "Improving nicely, can walk about; no ureamic convulsions since starting; albumen less; casts disappearing." Final report - "Am in active practice again. Think I'm about well."

NORTH CAROLINA - Age 27, albumen 3%. Heart so enlarged patient could not sleep naturally, having to sleep part of the time sitting up. Four weeks later - Albumen decreased one-third; dropsy diminishing and breathing about normal; no casts at present and the eye symptom has disappeared. "I believe she will make a complete recovery."

SHANGHAI, CHINA - An American physician practicing in Shanghai reporting six cases of Bright's treated by him "without a failure" gives details of one as follows: "Member of a wealthy family. Had been in the hands of some of the best European physicians in Shanghai. In bed a year; heart seriously involved; pulse 160; usual albumen, heavy casts, oedema excessive. I put her on Rx 1 with salines. The third week the albumen and casts reduced to a trace. Later, the dropsy disappeared and shortly thereafter patient was out of bed."

(Note - The reduction in casts noted the third week was unusual. It is well to note that in a majority of these cases the reports show reduction in casts require considerable more time than this case records hence patience is important. J.J.F.CO.)

DIFFUSION OF SUBSTANCES THROUGH POLYMER MEMBRANES

The diffusion of a substance through a polymer membrane is a process that depends on the nature of the substance and the membrane. It is a process that is governed by Fick's laws of diffusion.

The first law of diffusion states that the rate of diffusion is proportional to the concentration gradient.

Time (min)	Concentration (g/g)	Distance (cm)	Area (cm ²)
0	0.00	0.00	1.00
10	0.10	0.10	1.00
20	0.20	0.20	1.00
30	0.30	0.30	1.00
40	0.40	0.40	1.00
50	0.50	0.50	1.00
60	0.60	0.60	1.00
70	0.70	0.70	1.00
80	0.80	0.80	1.00
90	0.90	0.90	1.00
100	1.00	1.00	1.00

The second law of diffusion states that the rate of diffusion is proportional to the square of the distance.

The third law of diffusion states that the rate of diffusion is proportional to the inverse of the distance.

The fourth law of diffusion states that the rate of diffusion is proportional to the inverse square of the distance.

The fifth law of diffusion states that the rate of diffusion is proportional to the inverse cube of the distance.

A Quantitative Analytical Report is a Finding of Fact
and Facts are Unimpeachable.

Physicians of all schools have sent in reports from nearly all the States. Here is another dozen cases of Bright's Disease in which the physicians report total disappearance of albumen under this treatment:

West Va	Albumen	4.0%	Final none
Mo.	Albumen	9.2%	Final none
Texas	Albumen	20.0%	Final none
So. Dak.	" tube solid "		Final none
Ohio	Albumen	3.0%	Final none
Chicago	Albumen	5.0%	Final none
Mo.	Albumen	3.2%	Final none
Mo.	Albumen	3.0%	Final none
Wash.	Albumen	7.0%	Final none
Vermont	Albumen	4.0%	Final none
Georgia	Albumen	5.0%	Final none
So. Car.	Albumen	3.0%	Final none

A quantitative analytical report is a finding of fact and a fact is unimpeachable and this vital, revolutionary fact is here - ALBUMEN IN BRIGHT'S DISEASE IN BOTH ACUTE AND CHRONIC FORMS IS POSITIVELY BEING REDUCED BY FULTON COMPOUND Rx 1, as certified above and confirmed by thousands of urinalyses. The impossible cannot happen even once. There are no miracles. Everything that happens is under law and under the same conditions the same law must operate in the same way continually. There is no such thing as a negative fact. Every fact is affirmative and a mass of professional reports from Physicians representing all Schools and Societies is on deposit in this City as an unanswerable record for all time that wasting albumen in Bright's Disease in both acute and chronic forms is responding to this treatment.

As to what the disappearance of albumen means in Bright's Disease, it is common knowledge that the case is yielding when the albumen is diminishing. And that is just what is happening, and patients are living today who eliminated the albumen, casts and dropsy 10 to 20 years ago. Nothing else in the world that we know of is showing cases like these. Some of the reports cover cases that had been tapped as will be seen in the DIGEST.

Over 80% of hundreds of professional reports record the usual response to the treatment in patients having fair hearts and 60 to 90 days of life remaining. May be taken with the usual heart and eliminative treatment given in such cases. Is taken alone if patient is simply on diet. Can commence looking for a little decrease in the albumen in most cases between the 10th and 20th days, followed shortly thereafter by improvement beginning to show in one or more of the physical symptoms. Frequently this is reversed, the patient beginning to feel better before the albumen shows much response.

As the action is commonly deliberate and Bright's Disease and Nephritis are often of long and slow development, while some cases show early response many cases show very little improvement with the first quarter of a dozen, hence patience is a necessity, particularly in cases of considerable duration.

Page 12 of 12 Confidentiality Review

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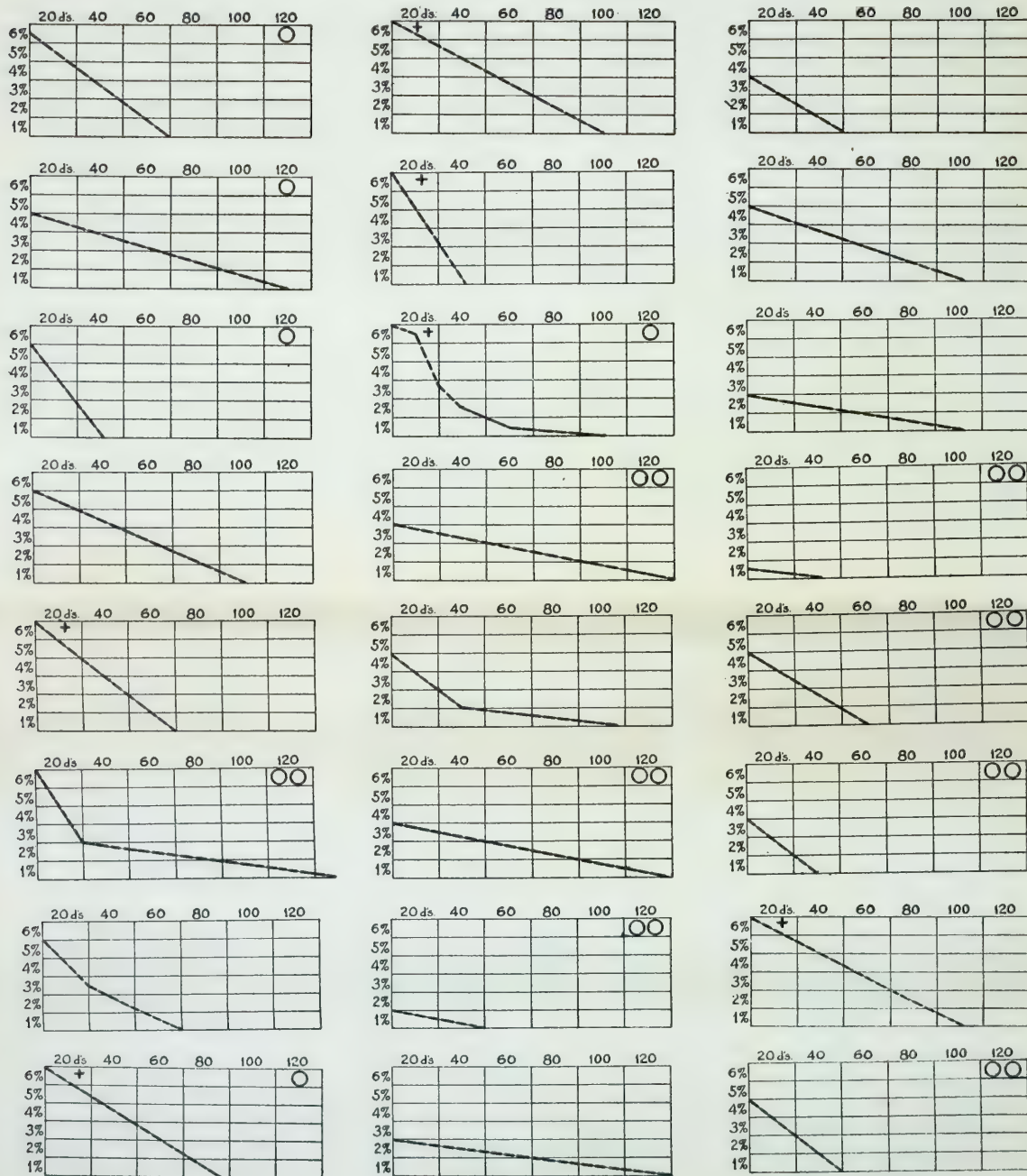
Account Number	123456789	123456789	123456789
Account Type	Checking	Checking	Checking
Account Status	Active	Active	Active
Account Balance	\$1,234.56	\$1,234.56	\$1,234.56
Account Holder	John Doe	John Doe	John Doe
Account Address	123 Main St	123 Main St	123 Main St
Account City	New York	New York	New York
Account State	NY	NY	NY
Account Zip	10001	10001	10001
Account Phone	212-123-4567	212-123-4567	212-123-4567
Account Email	john.doe@example.com	john.doe@example.com	john.doe@example.com
Account ID	123456789	123456789	123456789
Account PIN	1234	1234	1234
Account Security	High	High	High
Account Notes	None	None	None

The following information is being provided to you for your information only. It is not intended to be used for any other purpose. The information is being provided to you for your information only. It is not intended to be used for any other purpose.

The following information is being provided to you for your information only. It is not intended to be used for any other purpose. The information is being provided to you for your information only. It is not intended to be used for any other purpose.

The following information is being provided to you for your information only. It is not intended to be used for any other purpose. The information is being provided to you for your information only. It is not intended to be used for any other purpose.

Charts illustrating reports made by Physicians in 24 cases of BRIGHT'S DISEASE to show comparatively the number of days that elapsed between the beginning of the treatment and the elimination of the albumen.



- This sign in upper right hand corners designates cases in which the patient was a member of the Physician's family.
 - In cases bearing this sign the Physician himself was the patient.
 - +
- In blocks bearing this sign the percentage of albumen was reported as higher than 6%.
The bottom line in each block means no ~~albumen~~ *alb*, or so attenuated it was referred to as a trace.

United States
Circuit Court of Appeals
For the Ninth Circuit.

WALVILLE LUMBER COMPANY, a Corpora-
tion,

Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

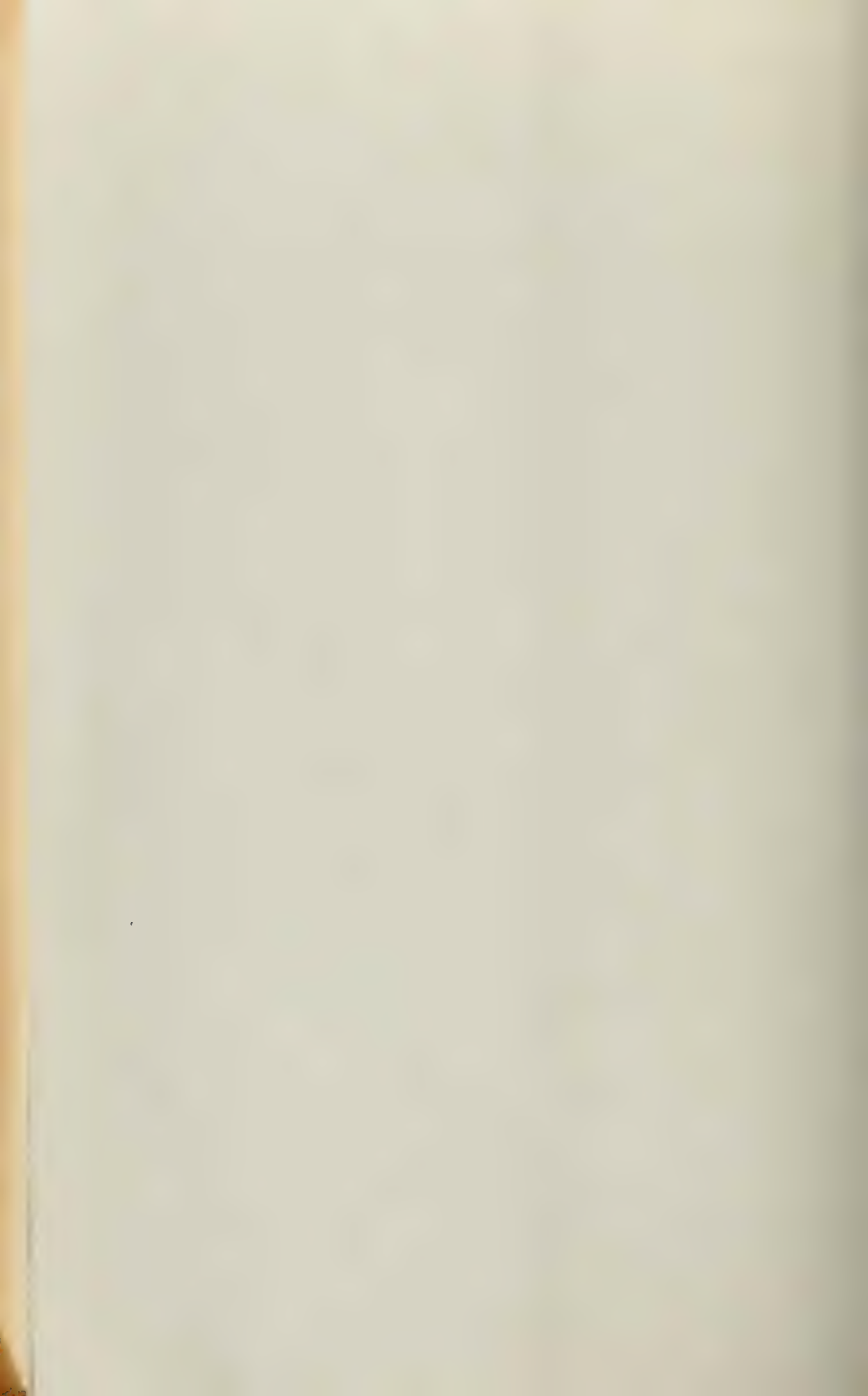
Transcript of Record.

UPON PETITION TO REVIEW AN ORDER OF THE UNITED
STATES BOARD OF TAX APPEALS.

FILED

FEB 20 1922

PAUL P. CORRIGAN,
CLERK



United States
Circuit Court of Appeals
For the Ninth Circuit.

WALVILLE LUMBER COMPANY, a Corpora-
tion,

Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,
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STATES BOARD OF TAX APPEALS.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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[1*] DOCKET 10,295.

WALVILLE LUMBER COMPANY, Walville,
Wash.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

For the Taxpayer:

ANDREW G. ELDER, Esq.

NATHAN W. HILL, Esq.

EUGENE H. KNAPP, Esq.

W. M. SMITH, Esq.

For the Commissioner:

HENRY RAVENEL, Esq.

DOCKET ENTRIES.

1925.

Dec. 24—Petition received and filed.

Dec. 29—Copy of petition served on Solicitor.

Dec. 29—Notification of receipt mailed taxpayer.

1926.

Feb. 1—Answer filed by Solicitor.

Feb. 1—Demand to produce filed by Solicitor.

Feb. 5—Copy of answer served on taxpayer. As-
signed Field Calendar.

1927.

May 12—Hearing date set 6-6-27 at Seattle, Wash.

*Page-number appearing at the top of page of original certified Transcript of Record.

May 20—Hearing changed to 6-13-27 at Room 427, County-City Bldg., Seattle, Wash.

June 13—Hearing had before Mr. Lansdon on merits. Case to stand submitted after filing of briefs. Briefs due 9-1-27 without reply.

Aug. 6—Transcript of hearing 6-13-27 filed.

Aug. 18—Motion for extension of time to 10-1-27 to file brief filed by taxpayer.

Aug. 18—Granted to 10-1-27. Both sides notified.

Aug. 17—Brief filed by G. C.

Oct. 1—Request for findings of fact filed by taxpayer.

Oct. 1—Brief filed by taxpayer.

1928.

May 28—Findings of fact and opinion rendered (Mr. Lansdon). Judgment will be entered for the Commissioner.

May 31—Order of redetermination entered.

Nov. 14—Motion for an order allowing certain exceptions filed by taxpayer. No. action taken.

Nov. 21—Motion for an order to stay collection of tax pending receipt of appeal to Circuit Court filed by taxpayer. Denied for lack of jurisdiction to issue an order as prayed.

Nov. 23—Petition for review by U. S. Cir. Ct. of Appeals, 9th Circuit, with assignments of error filed by taxpayer.

Nov. 23—Proof of service filed by taxpayer.

- Nov. 23—Statement of evidence lodged.
- Nov. 23—Proof of service of statement with notice of hearing 12-10-28 filed.
- Dec. 3—Objections to proposed statement of evidence filed by G. C.
- Dec. 3—Proof of service of objections filed by G. C.
- Dec. 10—Amendment to statement lodged.
- Dec. 10—Notice of lodging of amendment filed by taxpayer.
- Dec. 10—Proof of service filed—Hearing 12-10-28.
- [2] Walville Lumber Co.—No. 10,925.

DOCKET ENTRIES (Continued).

1928.

- Dec. 11—Statement of evidence approved and ordered filed.
- Dec. 11—Order incorporating amendment lodged 12-10-28 in statement, entered.
- Dec. 10—Hearing had before Mr. Lansdon on statement of evidence. Submitted.
- Dec. 14—Transcript of hearing 12-10-28 filed.

1929.

- Jan. 10—Stipulation *re* forwarding original exhibits filed.
- Jan. 10—Praecipe with proof of service thereon filed.
- Jan. 22—Order enlarging time to 2-15-29 to file certified copies of record papers entered.

Now, January 26, 1929, the foregoing docket entries certified from the record as a true copy.

[Seal]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

[3] Filed Dec. 24, 1925. U. S. Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 10,295.

Appeal of WALVILLE LUMBER COMPANY
Walville, Washington.

PETITION.

Comes now the above-named corporation, by its attorney, Andrew G. Elder, and appeals from the determination of the Commissioner of Internal Revenue set forth in a deficiency letter bearing symbols IT:CA:2558-1 60D dated November 9, 1925, a copy of which is submitted herewith, marked Exhibit "A," together with a copy of a letter bearing symbols IT:CA:2558-1, dated May 5, 1925, marked Exhibit "B," and as a basis of its appeal sets forth the following:

I.

The taxpayer is a corporation organized and existing under the laws of the State of Washington, with its office and principal place of business at Walville, of said state.

II.

The deficiency letter bears date of November 9, 1925, the actual date of mailing to the taxpayer being unknown.

[4] III.

The taxes in controversy are income and profits taxes for the calendar year 1919 of less than \$10,000.00, the amount stated in the deficiency letter being \$7,514.86.

IV.

ASSIGNMENTS OF ERROR.

1. The Commissioner of Internal Revenue erred in disallowing the loss sustained with respect to an investment in shares of stock of the Walworth & Neville Manufacturing Company acquired in the year 1908 at a cost of \$440,000.00, with a value at the basic date of March 1, 1913, of \$225,967.28 as determined by the Bureau of Internal Revenue, said loss representing such fair value in excess of the amount received therefor upon the dissolution of the issuing company.
2. The said Commissioner erred in charging against paid-in surplus instead of earned surplus, or deficit account, the loss as shown by the books of the petitioner, of \$440,000.00 with respect to the said investment.

V.

STATEMENT OF THE FACTS.

As the basis of its appeal the petitioner alleges the following facts known to it or of which it has

been informed and believes, and upon such information and belief alleges the facts to be as follows:

- [5] 1. The petitioner was incorporated in the year 1908 under the laws of the State of Washington with an authorized capital stock of \$1,000,000.00 consisting of 10,000 shares of the par value of \$100.00 each.
2. All of the said shares of stock were issued for the acquisition of timber, timbered and logged-off land, lumber-mill, cross-arm factory, logging railroad and equipment, etc., situated in Lewis and Pacific counties, in the State of Washington, theretofore owned and operated by the Walworth & Neville Manufacturing Company, whose principal office was in Chicago, Illinois, together with 4,400 shares, par value \$440,000.00, of the capital stock of the said company, and the assumption of certain liabilities.
3. The assets acquired for shares of stock had a fair value, as determined by the Bureau of Internal Revenue and set forth in the deficiency letter, of \$170,329.46 in excess of the par value of the shares of stock issued therefor and the liabilities assumed.
4. In the year 1919 the capital stock of the petitioner was reduced, without consideration, from \$1,000,000.00 to \$500,000.00 consisting of 2,500 shares of common and 2,500 shares of preferred stock, of the par value of \$100.00

each, which reduction in capital stock was credited or creditable to paid-in surplus.

- [6] 5. Prior to the reduction of the capital stock of the petitioner, the Walworth & Neville Manufacturing Company was also the owner or holder of 5,541 shares, par value \$554,100.00, of the petitioner's capital stock, scaled down to 2,770 $\frac{1}{2}$ shares consisting of 1,365 $\frac{1}{4}$ shares of common and 1,385 $\frac{1}{4}$ shares of preferred stock.
6. No certificate or certificates evidencing the reduced shares of stock of the petitioner were ever issued to the Walworth & Neville Manufacturing Company representing the said 2,770 $\frac{1}{2}$ shares, or any other number; instead, certificates for 1,385 $\frac{1}{4}$ shares of preferred stock and 629 $\frac{1}{4}$ shares of common stock were issued directly to certain stockholders of the Walworth & Neville Manufacturing Company.
7. The balance of the said 1,385 $\frac{1}{4}$ shares of the common stock of the petitioner referred to under (6) above, or 756 shares, were never issued.
8. The Walworth & Neville Manufacturing Company, in which the petitioner owned 4,400 shares of stock with a par value of \$440,000.00, was formally dissolved in the latter part of the year 1919.
9. At the date of such dissolution the Walworth & Neville Manufacturing Company had no

assets, its stockholders, including the petitioner, receiving nothing as a liquidating dividend.

- [7] 10. The investment of the petitioner in 4,400 shares of stock of the Walworth & Neville Manufacturing Company acquired at a cost of \$440,000.00 had a fair value at the basic date of March 1, 1913, of \$225,967.28 as determined by the Bureau of Internal Revenue.
11. The petitioner accordingly realized a deductible loss with respect to its investment in the stock of the Walworth & Neville Manufacturing Company representing the fair value at the basic date of March 1, 1913.
12. In connection with the preparation of the income and profits tax return of the petitioner for the calendar year 1919 there was taken into account as a tentatively determined loss the amount of \$74,400.00 with respect to the investment in shares of stock of the Walworth & Neville Manufacturing Company.
13. Such tentatively determined loss, which is less than the loss based on either the cost or the value of the investment at March 1, 1913, whichever is less, has been disallowed by the Commissioner on the hypothesis that the petitioner exchanged 4,400 shares of the stock of the Walworth & Neville Manufacturing Company for 756 shares of the petitioner's own stock, or a "capital transac-

tion," and that the loss therefrom is not deductible for the purpose of computing taxable net income, citing as authority Article 862 of Regulations 45 relating to the determination of invested capital, and Office Decision 479 (2 C. B. 29), relating to the effect upon [8] taxable income of a voluntary purchase by a corporation of its own shares of stock; whereas, as set forth under (7), *supra*, the said 756 shares of stock were never issued and could not, therefore, have been received or acquired in exchange or as a liquidated dividend.

14. Predicated on the view that the loss sustained with respect to the investment in shares of stock of the Walworth & Neville Manufacturing Company as shown by the books, or \$440,000.00, represented consideration paid for the voluntary retirement or purchase of the petitioner's own shares of stock, or a "capital transaction," which is not consistent with the facts, the Commissioner has charged such loss against paid-in surplus rather than to earned surplus (or deficit) account, thereby reducing paid-in surplus at the end of the year 1919 from \$670,329.46 as shown by a statement forming a part of the deficiency letter, with a corresponding understatement of the invested capital for the year 1920 as set forth in a letter from the

Commissioner's office dated May 5, 1925, and submitted herewith as Exhibit "B."

VI.

PROPOSITIONS OF LAW.

The petitioner, in support of its appeal, relies upon the following propositions of law:

1. Section 234 (a) (4) of the Revenue Act of 1918 provides that in computing the net income of a corporation subject to the tax imposed by Section 230, there shall be allowed as [9] deductions, losses sustained during the taxable year and not compensated for by insurance or otherwise, and (5) debts ascertained to be worthless and charged off within the taxable year.
2. Article 144 of Regulations 45, Rev., Jan. 28, 1921, also provides in part:
“ * * * if stock of a corporation becomes worthless, its cost or its fair market value as of March 1, 1913, if acquired prior thereto, may be deducted by the owner in the taxable year in which the stock became worthless, provided a satisfactory showing of its worthlessness is made as in the case of bad debts.”
3. Section 202 (a) (1) of the Act of 1918, as construed by the Supreme Court and embodied in regulations of the Treasury Department, provides that the deductible loss with respect to the sale or other disposition of property acquired prior to March 1, 1913, shall be the

excess of the cost of such property or the value at the basic date mentioned, whichever is less, over the amount or the value of property received from the disposition thereof.

4. The 4,400 shares of stock of the Walworth & Neville Manufacturing Company were cancelled by operation of law upon dissolution of the issuing company.
5. The surrender and cancellation of the said shares of stock incident to the dissolution of the issuing company was not a sale or exchange within the meaning of the [10] statute, the petitioner having received nothing as a liquidating dividend, or other consideration therefor.
6. The petitioner did not as a matter of fact or in contemplation of law purchase or otherwise reacquire or retire the 756 shares of its own stock in question which merely remained unissued incident to the reduction of the petitioner's authorized capital stock.
7. The loss thus sustained during the taxable year with respect to the investment in shares of stock acquired at a cost of \$440,000.00 and having a value at the basic date of March 1, 1913, of \$225,967.28 as ascertained by the Bureau of Internal Revenue, was determined as the result of a completed and closed transaction within the meaning of the Revenue Act of 1918, and the regulations promulgated thereunder, upon the dissolution of the

issuing company. Such loss is deductible for the purpose of computing taxable net income of the said taxable year 1919.

8. Section 326 of the Revenue Act of 1918 provides in effect that there shall be included in statutory invested capital the actual cash value of tangible property, other than cash, *bona fide* paid in for stock or shares at the time of such payment, whether such actual value is represented by capital stock or paid-in surplus, and such invested capital may not be reduced by an operating deficit.
9. The measure of the invested capital of the petitioner is \$1,170,329.46, represented, prior to the reduction in [11] capital stock, by the par value thereof, or \$1,000,000.00, and the paid-in surplus of \$170,329.46 at the inception of the company and, after the reduction of the capital stock to \$500,000.00, by the par value thereof plus the paid-in surplus of \$670,329.46, representing such paid-in surplus of \$170,329.46 at the inception of the company and the reduction of \$500,000.00 in capital stock without consideration credited or creditable to paid-in surplus.

WHEREFORE, the petitioner prays that the Board of Tax Appeals may hear and determine its appeal.

ANDREW G. ELDER,
Attorney for Taxpayer-Petitioner,
1288 Dexter Horton Building,
Seattle, Washington.

[12] State of Washington,
County of Lewis,—ss.

J. B. Banton, being duly sworn, says that he is secretary and treasurer of the Walville Lumber Company, above named, and as such is authorized to verify the foregoing petition; that he has read the said petition or had the same read to him, and is familiar with the statements therein contained, and that the facts therein stated are true, except such facts as are stated to be upon information and belief and those facts he believes to be true.

J. B. BANTON.

Subscribed and sworn to before me this 17th day of December, A. D. 1925.

[Seal] ARCHIBALD WILSON,
Notary Public in and for the State of Washington,
Residing at Walville.

[13] EXHIBIT "A."

TREASURY DEPARTMENT.

Washington, Nov. 9, 1925.

Office of
Commissioner of Internal Revenue.
IT:CA:2558-1-60D.
Walville Lumber Company,
Walville,
Washington.

Sirs: Your claim in abatement in the amount of \$7,514.86 for 1919 has been examined, in connection with returns filed, an examination of the books of

account, and conference held in the Unit July 14, 1925, and as set forth in letter dated September 8, 1925. The claim will be rejected, as shown in detail in the attached statement.

In accordance with the provisions of Section 279 (b) of the Revenue Act of 1924, you are allowed 60 days from the date of this letter within which to file an appeal to the Board of Tax Appeals contesting in whole or in part the correctness of this determination.

If you acquiesce in this determination and do not desire to file an appeal, you are requested to sign the enclosed agreement consenting to the assessment of the deficiency and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:CA:-2558-1-60D. In the event that you acquiesce in a part of the determination, the agreement should be executed with respect to the items agreed to.

Respectfully,

D. H. BLAIR,

Commissioner.

By C. R. NASH,

Assistant to Commissioner.

[14] STATEMENT.

IT:CA:2558-1-60D.

Nov. 9, 1925.

In re: Walville Lumber Company,
Walville, Washington.
1919.

Deficiency in tax—\$7514.86.
(Assessed May, 1925, 274-D.)
Claim for Abatement Rejected.
Net Income.

Net income reported			\$1,763.27
Add:			
(a) Excessive depreciation	\$ 7,823.61		
(b) Losses on W. & N. Manufacturing Company	74,400.00		
(c) Logging Railway Roadbed ...	3,322.33		
(d) Legal expenses	2,000.00	87,545.94	
			\$89,309.21
Deduct:			
(e) Additional depletion	\$6,742.77		
(f) Repairs to boiler.....	1,980.50		
(g) Taxes under accrual.....	2,009.25		
(h) Loss on sale of wharf.....	1,900.93		
(i) Donations	608.30	13,241.75	
Net income as adjusted.....			\$76,067.46

	<u>Invested Capital.</u>	
Capital stock		\$1,000,000.00
Surplus paid in		170,329.46
		<hr/>
		\$1,170,329.46
Less:		
Inadmissibles		264,494.46
		<hr/>
Invested capital adjusted		\$ 905,835.00
Excess profits credit		75,466.80

[15] In re: Walville Lumber Company.
Computation of Tax.

% of Capital 20	Income \$76,067.46	Excess Profits Credit \$75,466.80	Balance \$600.66	Rate 20%	Amount of Tax \$120.13
<hr/>					
Total profits tax.....					\$120.13
Net income			\$76,067.46		
Less:					
Profits tax		\$ 120.13			
Exemption	2,000.00		2,120.13		
			<hr/>		
Balance subject to tax at 10%.			\$73,947.33		
Amount of tax at 10%.....					7394.73
					<hr/>
Total tax assessable.....					\$7514.86
Tax assessed, May, 1925, Page 0), Line 0, Special 3 (274d).					7514.86
					<hr/>
					None

Explanation of Adjustments to Net Income.

a. Depreciation on your fixed assets as computed

in the revenue agent's report, a copy of which has been furnished you, has been accepted by this office for the taxable year.

b. Loss claimed on Walworth and Neville Manufacturing Co. stock is not allowed as a deduction from income, since same is considered a capital account. (See Article 862, Regulations 45.) Office Decision 479; Cumulative Bulletin 111-2.)

c. Logging Railway Roadbed restored to income, inasmuch as it is a capital expenditure.

d. Legal expense, anticipated expenses, are not deductible from income

e. Depletion allowed on 28,112M feet
 at a unit rate of 2.88 a M feet....\$80,962.56
 Depletion claimed 74,219.77
 Additional depletion allowed.....\$ 6,742.77

f. Repairs to boilers allowed as an expense.

g. Taxes under accrued allowed as an expense.

[16] STATEMENT.

In re: Walville Lumber Company,

h. Loss on sale of Southbend Wharf as an expense:

Cost	\$4,455.36
Depreciation	2,429.43
	\$2,025.93
Selling price	125.00
	\$1,900.93

i. Donations deducted	\$ 647.30
Donations unallowed	39.00

Donations allowed \$ 608.30

Balance Sheet.

December 31, 1918.

Plant and equipment	\$ 247,718.93
Timber	245,790.35
Land	24,514.05
Liberty bond account	1,000.00
Logs and lumber	57,085.14
Supplies	27,717.13
Accounts receivable	15,070.60
Cash	4,073.02
Deferred charges	3,494.12
Stock in Lumber Manufacturing Agency	2,000.00
Stock in Walworth and Neville Manu- facturing Company	440,000.00
	<hr/>
	\$1,068,463.34

Bonds first mortgage.....	\$ 105,500.00
Bills payable	41,957.44
Accounts payable	15,484.41
Interest accrued, notes	1,599.72
Interest accrued, bonds	2,637.50
Pay-roll	16,545.30
Taxes accrued	6,666.03
Capital stock	1,000,000.00

Paid-in surplus	170,329.46
Deficit	(292,256.52)

\$1,068,463.34

[17] STATEMENT.

In re: Walville Lumber Company,

December 31, 1919.

Cash	\$ 29,396.63
Accounts receivable	31,613.87
Liberty bonds	2,500.00
Logs and lumber	72,276.06
Supplies and material	28,482.95
Plant and equipment	240,168.00
Timber	164,827.79
Land	24,514.05
Stock in Lumber Manufacturing Agency	2,000.00
Deferred charges	4,374.25

\$600,153.60

First mortgage bonds	\$ 39,000.00
Notes payable	2,125.00
Accounts payable	20,829.11
Pay-roll	17,855.68
Interest accrued	2,005.52
Taxes accrued	7,577.57
Capital stock	500,000.00

Paid-in surplus	230,329.46
Deficit	(219,568.74)

\$600,153.60

Analysis of Surplus.

Deficit, December 31, 1918		\$292,256.52
Net income	\$76,067.46	
Nontaxable	1,184.11	77,251.57
		<hr/>
Balance		\$215,004.95
Taxes	\$ 4,524.79	
Donations	39.00	4,563.79
		<hr/>
Deficit, December 31, 1919		\$219,568.74

[18] STATEMENT.

In re: Walville Lumber Company

Payment of the amount rejected should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

You are also advised that a Certificate of Over-assessment, amounting to \$6,708.87 for the year 1920, as outlined to you in office letter dated May 5, 1925, will be made the subject of a separate communication and will reach you in due course through the office of the Collector of Internal Revenue for your district and will be applied by that official in accordance with Section 281, of the Revenue Act of 1924.

The 1921 return will be closed on the basis outlined to you in office letter dated May 5, 1925.

[19] EXHIBIT "B."

TREASURY DEPARTMENT.

Washington, May 5, 1925.

Office of

Commissioner of Internal Revenue.

IT:CA-2558-1.

Walville Lumber Company,

Walville,

Washington.

Sirs: An examination of your 1920 income and profits tax return, in connection with your books of accounts and records and your claim for refund amounting to \$19,022.86, has been made.

Your claim will be allowed for \$6,708.87 and rejected for \$12,313.99. For details see the enclosed statement.

The amount allowed will be made the subject of a certificate of overassessment which will reach you in due course through the office of the Collector of Internal Revenue for your district and will be applied by that official in accordance with the provisions of Section 281 of the Revenue Act of 1924.

The Collector of Internal Revenue for your district will be officially notified at the expiration of thirty days from the date of this letter of the rejection.

Respectfully,

J. G. BRIGHT,

Deputy Commissioner.

By F. R. CLUTE,

Head of Division.

[20] STATEMENT.

IT:CA-2558-1.

In re: Walville Lumber Company,
Walville, Washington.
1920.

Overassessment—\$6,708.87.

Net income recommended by agent....		\$156,688.15
Depletion claimed	\$70,778.95	
Depletion allowed	62,560.99	
	<hr/>	
	\$ 8,217.96	
Donation allowed	761.50	7,456.46
	<hr/>	
Net income corrected		\$164,144.61
		<hr/>
	<u>Invested Capital.</u>	
Capital stock		\$500,000.00
Paid-in surplus		230,329.46
		<hr/>
Total		\$730,329.46
Dividends prorated		3,790.98
		<hr/>
Balance		\$726,538.48
Deduction—Inadmissibles		1,184.26
		<hr/>
Invested capital		\$725,354.22
		<hr/>
Profits tax		\$24,438.01
Net income	\$164,144.61	

Less:		
Profits tax	\$24,438.01	
Exemption	2,000.00	\$ 26,438 01
<hr/>		
Taxable at 10%	\$137,706.60	
Tax at 10%		\$13,770.66
<hr/>		
Total		\$38,208.67
Tax previously assessed		44,917.54
<hr/>		
Overassessment		\$ 6,708.87
<hr/>		

[21] Balance Sheet.

December 31, 1919.

Cash	\$ 29,396.63
Accounts receivable	31,613.87
Liberty bonds	2,500.00
Logs and lumber	72,276.06
Supplies and material	28,482.95
Plant and equipment	240,168.00
Timber	164,827.79
Land	24,514.05
Stock in Lumber Manufacturing Agency	2,000.00
Deferred charges	4,374.25
<hr/>	
\$600,153.60	
<hr/>	
First mtg. bonds	\$ 39,000.00
Notes payable	2,125.00
Accounts payable	20,829.11
Pay-roll	17,855.68

Interest accrued	2,005.52
Taxes accrued	7,577.57
Capital stock	500,000.00
Paid-in surplus	230,329.46
Deficit operating	(219,568.73)
<hr/>	
Total	\$600,153.60
<hr/>	

Balance Sheet.

December 31, 1920.

Cash	\$ 52,306.27
Accounts receivable	16,896.76
Notes receivable	1,240.00
Logs and lumber	167,170.31
Supplies and materials.....	26,510.09
Liberty bonds	2,500.00
Notes investment	88,697.79
Chehalis mill site	12,820.20
Plant and equipment	236,906.20
Timber	107,066.80
Land	24,514.05
Stock in Lumber Manufacturing Agency	200.00
Deferred charges	5,471.82
<hr/>	
\$742,300.29	
<hr/>	

[22] Balance Sheet.

(Continued.)

(December 31, 1920)

Notes payable	\$ 2,125.00
Accounts payable	47,634.47

Wages payable	16,924.02
Dividend payable	7,500.00
Interest accrued	1,050.99
Taxes accrued	5,336.03
Capital stock	500,000.00
Paid-in surplus	230,329.46
Deficit	(68,599.68)

\$742,300.29

Deficit 12/31/1919	\$219,568.76
Net income 1920	\$164,144.61
Nontaxable	2,392.45
	\$166,537.06

Balance	\$ 53,031.70
Dividends	\$ 15,000.00
Donations	18.00
Taxes overaccrued	550.00
	\$ 15,568.00

Deficit 12/31/20	\$ 68,599.68
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Now, January 26, 1929, the foregoing petition certified from the record as a true copy.

[Seal]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[23] Filed Feb. 1, 1926. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 10295.

Appeal of WALVILLE LUMBER COMPANY,
Walville, Washington.

ANSWER.

The Commissioner of Internal Revenue, by his attorney, A. W. Gregg, Solicitor of Internal Revenue, for answer to the petition of this taxpayer, admits and denies as follows:

I. Admits the allegations contained in paragraphs 1, 2, and 3 of the petition.

II. Denies that the Commissioner committed the errors alleged in paragraph 4 of the petition.

III. With reference to the allegations contained in paragraph 5 of the petition, admits, denies and alleges as follows:

(1)–(8) Admits the allegations contained in subdivisions (1) to (8), inclusive.

(9) Specifically denies the allegations contained in subdivision (9).

(10) Admits the allegations contained in subdivision (10).

(11) Specifically denies the allegations contained in subdivision (11).

(12) With reference to the allegations contained in subdivision (12), admits that the taxpayer in filing its original return for the calendar year 1919 deducted from gross income as a loss sustained by it on account of its investment in

shares of stock of the Walworth & Neville Manufacturing Company the sum of \$74,400.00.

[24] (13) Admits that the Commissioner disallowed the deduction of said loss from the taxpayer's gross income for the reason that said loss resulted from the taxpayer's exchanging shares of its own stock for shares of stock in another company and then in the year 1919 receiving back a portion of the shares of its own stock in exchange for the shares of stock held in the other company.

(14) With reference to the allegations contained in subdivision (14), admits that the Commissioner deducted the amount of said loss as determined by him from the taxpayer's paid-in surplus.

IV. Specifically denies each and every allegation contained in the taxpayer's petition not hereinabove expressly admitted to be true.

PROPOSITIONS OF LAW.

(1) Where a corporation exchanged shares of its own stock for shares of stock in another corporation and later upon liquidation of the other corporation received back a portion of its own shares of stock, the resulting loss on the transaction is not deductible from the taxpayer's gross income but affects only its invested capital.

(2) Where a corporation buys its own stock the entire cost of such stock must be deducted from its invested capital.

WHEREFORE, it is prayed that the taxpayer's appeal be dismissed.

A. W. GREGG,
Solicitor of Internal Revenue.
Attorney for Commissioner of Internal Revenue.
Of Counsel:

GEORGE G. WITTER,
Special Attorney,
Bureau of Internal Revenue.

Now, January 26, 1929, the foregoing answer certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[25] United States Board of Tax Appeals.

Promulgated May 28, 1928.

DOCKET No. 10295.

WALVILLE LUMBER COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Company A owned all the capital stock of Company B, for which it had exchanged all its assets and fifty-five per cent of its common stock. It had transacted practically no business for ten years other than to receive dividends on Company B stock, pay out the money so received to its own stockholders and attend to

its duties as stockholder. In 1919 Company B reorganized, reduced its capital stock one-half, and issued 4,244 of the authorized issue of 5,000 shares pro rata to the stockholders of Company A, other than itself, and left 756 shares unissued. Company A was immediately dissolved and paid nothing to its stockholders. *Held*, that Company B suffered no deductible loss under section 234 of the Revenue Act of 1918.

ANDREW G. ELDER, Esq., NATHAN W. HILL, Esq., and EUGENE H. KNAPP, Esq.,
for the Petitioner.

HENRY RAVENAL, Esq., for the Respondent.

This proceeding results from the determination by respondent of a deficiency of \$7,514.86 in petitioner's income and profits taxes for the year 1919. The deficiency arises from the refusal of the respondent to allow a deduction of \$74,400 claimed by the petitioner as a loss sustained by it on 4,400 shares of stock of the Walworth & Neville Manufacturing Company purchased and paid for by petitioner in 1908, and which had become worthless within the year 1919.

A true copy.

[Seal]

Teste: B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

[26] FINDINGS OF FACT.

The petitioner, hereinafter referred to as the lumber company, was incorporated in 1908 under

the laws of the State of Washington, with authorized capital stock of \$1,000,000, divided into 10,000 shares of the par value of \$100, each. In the same year it acquired from the Walworth & Neville Manufacturing Company, a Michigan corporation, hereinafter referred to as the manufacturing company, certain timber lands, cut-over lands, sawmill, cross-arm factory, machinery and equipment, and 4,400 shares of the stock of the manufacturing company, and issued therefor its entire authorized capital stock to persons not disclosed by the record. The value of this property at date of acquisition by the petitioner was \$1,170,000.

The 4,400 shares of stock acquired from the manufacturing company as above set forth and owned by the petitioner at March 1, 1913, had a fair market value of \$225,967.28 on that date. In the taxable year the manufacturing company owned 5,541 shares of the stock of the petitioner.

In 1919 the petitioner reduced its capital stock without consideration to 2,500 shares of common stock and 2,500 shares of preferred stock, all of the par value of \$100, each. This procedure reduced the 5,541 shares of the petitioner's stock then owned by the manufacturing company to 1,385 $\frac{1}{4}$ shares of common and 1,385 $\frac{1}{4}$ shares of preferred. In the distribution of its reduced stock, the petitioner issued 1,385 $\frac{1}{4}$ shares of preferred to certain owners of the preferred stock of the manufacturing company, 629 $\frac{1}{4}$ shares of common to other stockholders of [27] such company, 1114 $\frac{3}{4}$ shares of preferred and 1114 $\frac{3}{4}$ shares of common to its other

shareholders and retained unissued 756 shares of common.

Upon the completion of the reorganization of the petitioner the manufacturing company had no assets, except its interest in the stock of the petitioner, and was dissolved with its outstanding stock of the par value of \$440,000 owned by the lumber company. It was also in debt to its own preferred stockholders in amounts not disclosed by the record.

In its income and profits-tax return for the year 1919 the petitioner estimated the value at March 1, 1913, of its 4,400 shares of the stock of the manufacturing company at \$150,000, and deducted as a loss sustained in the taxable year the difference between such value and the par value of its 756 shares of unissued stock in the amount of \$74,400. The respondent disallowed the deduction so claimed and determined the deficiency here in controversy. The parties agree that the stock of the manufacturing company owned by the petitioner had a fair market value of \$225,967.28 at March 1, 1913, and that the unissued stock of the petitioner in the taxable year had a fair market value of \$107,197.53, and that the manufacturing company owned 5,541 shares of the common stock of the petitioner just prior to the reorganization thereof.

The stock of the manufacturing company consisted of 8,000 shares of common and 1,000 shares of preferred. At the date of the reorganization of the transactions involved in this proceeding, the petitioner owned 44/80th of the common stock of

the manufacturing company and the [28] manufacturing company owned 55.41 per cent of the stock of the petitioner.

OPINION.

LANSDON.—At the hearing before the Board counsel for petitioner said:

The Walworth Manufacturing Company was dissolved in the year 1919. At the date of its dissolution that corporation owned certain shares of stock in the Walville Lumber Company which may be accepted, and I believe it is admitted as being its only asset at or immediately prior to the dissolution. The reduced shares of stock of the petitioner which were issuable to the Walworth & Neville Manufacturing Company as one of its stockholders were never, in fact, issued to that company. Instead, its proportion of the preferred stock and $629\frac{1}{4}$ shares of the common stock were issued directly to the stockholders of the Walworth & Neville Manufacturing Company, other than the petitioner, 756 shares which might in the ordinary course have been issued to the Walworth & Neville Manufacturing Company never having been issued.

This statement, while it may not be considered as evidence, is clearly an admission that the petitioner instead of issuing its shares of diminished stock to the manufacturing company, in proportion to the stockholdings thereof, actually issued them to certain of the stockholders of that company. The

admission is in line with and tends to confirm the conclusion naturally deducible from the facts in evidence, that the stockholders of the two companies, including, necessarily, the companies themselves, decided to and did take a short cut across lots to accomplish the result they had in mind; that they in effect restored to the lumber company title to all its capital stock on condition that the number of shares be decreased one-half, as they were decreased, and be issued, as they were issued, to certain of the stockholders of the manufacturing company. As a part of the final result, the 4,400 shares of the stock of the defunct [29] manufacturing company became worthless in the hands of the petitioner which as a set-off to this loss retained 756 shares of its new stock unissued. There was evidently an agreement among the two companies and their stockholders to consider that all customary legal steps had been accomplished by the results attained.

So far as we have been able to ascertain, petitioner has received no compensation for its manufacturing company stock, except the 756 shares of its own stock remaining unissued. Considering the transaction as a whole, we have here seemingly a gain to the lumber company of 756 shares of its own authorized second issue as against a loss of the 4,400 shares of the manufacturing company's stock, a net gain or loss of the difference between these two. Substituting admitted values for shares, we have \$225,769.28 loss, minus \$107,197.53, which equals \$118,769.75, the loss which the peti-

tioner now alleges that it sustained in the taxable year.

These transactions could not have taken place without the lumber company's assistance; certainly not without its acquiescence. It held 4,400 of the 8,000 shares of the common stock of the manufacturing company. That is to say, its shares constituted $\frac{44}{80}$ ths of the common stock and $\frac{44}{90}$ ths of all the stock, and therefore, as stated in its tax return for 1919, it "held a controlling interest in the stock" of that company. It must, therefore, have decided to do the things which were done.

After reorganization the petitioner's stock consisted of 2,500 shares of preferred and 2,500 shares of common, of which $1,385\frac{1}{4}$ [30] shares of preferred and an equal number of shares of common should have been issued to the manufacturing company, which was the owner of 55.41 per cent of the petitioner's original 10,000 shares of issued capital stock. If, after such issue, the manufacturing company had distributed the stock so received as a liquidating dividend, the petitioner, as the owner of 4,400 of the 9,000 outstanding shares of stock of the manufacturing company, would have received back $1,354\frac{1}{4}$ shares of its own stock, and other owners of the stock of the manufacturing company would have received the remainder, or 1,416 shares. Probably on account of its obligations to its preferred stockholders the manufacturing company distributed, or consented to distribution directly to its stockholders, $1,385\frac{1}{4}$ shares of the preferred and $629\frac{1}{4}$ shares of the common stock,

which were due it from the petitioner after reorganization. The effect of this procedure was that the petitioner received no part of the 1,354 shares of its stock due as a liquidating dividend from the manufacturing company and received no advantage therefrom measurable in stock other than the retention of 756 shares of its new common stock unissued.

Since each of the two companies here involved owned a controlling interest in the common stock of the other when the procedure above described was decided upon, we may assume that all the steps taken were the acts of the two corporations with the knowledge and consent of the stockholders of each. Obviously the petitioner must have agreed to [31] relinquish a part of the liquidating dividend due it upon the dissolution of the manufacturing company in favor of the proferred stockholders of that concern. Whether the extra stock received by such preferred stockholders was a gift to them, a liquidating dividend from the manufacturing company, or a stock dividend distributed by the petitioner, cannot be determined from the meager record before us and in our opinion is not material. In any event, the petitioner has proved no loss deductible from its income in the taxable year for tax purposes.

Reviewed by the Board.

Judgment will be entered for the respondent.

Now, January 26, 1929, the foregoing findings of fact and opinion certified from the record as a true copy.

[Seal]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

[32] United States Board of Tax Appeals,
Washington.

DOCKET No. 10295.

WALVILLE LUMBER COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ORDER OF REDETERMINATION.

Pursuant to the Board's findings of fact and opinion, promulgated May 28, 1928, it is

ORDERED AND DECIDED: That, upon re-determination, there is a deficiency for the year 1919 in the amount of \$7,514.86.

(Signed) B. H. LITTLETON,

Member, United States Board of Tax Appeals.
Washington, D. C.

Entered May 31, 1928.

A true copy.

Teste: B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

Now, January 26, 1929, the foregoing order of redetermination certified from the record as a true copy.

[Seal]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

[33[Filed Nov. 14, 1928. United States Board
of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 10295.

WALVILLE LUMBER COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITIONER'S EXCEPTIONS.

To the Members of the United States Board of Tax
Appeals:

Comes now the Walville Lumber Company, a corporation, petitioner above named, by its attorneys, Andrew G. Elder and Joseph Nievinski, and hereby excepts to the following and hereby requests and moves the Board for an order allowing the petitioner exceptions to the following:

I.

Petitioner excepts to the failure and refusal of the Board to find and adopt petitioner's requested finding of fact number one.

II.

Petitioner excepts to the failure and refusal of the Board to find and adopt petitioner's requested finding of fact number two.

[34] III.

Petitioner excepts to the failure and refusal of the Board to find and adopt petitioner's requested finding of fact number five.

IV

Petitioner excepts to the failure and refusal of the Board to find and adopt petitioner's requested finding of fact number six.

V.

Petitioner excepts to the findings of fact, and to each of them, and to the opinion and decision of the Board made and entered herein under date of May 28, 1928.

VI.

Petitioner excepts to the order of redetermination entered herein on May 31, 1928, deciding that upon redetermination there is a deficiency for the year 1919 in the amount of \$7,514.86.

ANDREW G. ELDER,
JOSEPH NIEVINSKI,
Attorneys for Petitioner.

ORDER ALLOWING PETITIONER'S EX-
CEPTIONS.

The above-entitled matter coming on regularly for hearing before the undersigned member of the above-entitled Board upon the petitioner's excep-

tions to certain matters and proceedings herein, and the matter having come on regularly [35] for hearing and the Board being fully advised in the premises,—

NOW, THEREFORE, IT IS HEREBY ORDERED that each and every one of petitioner's exceptions as set out above be and the same are hereby allowed.

Done at Washington, D. C., this — day of November, 1928.

Member, United States Board of Tax Appeals.

Now, January 26, 1929, the foregoing petitioner's exceptions certified from the record as a true copy.

[Seal]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

[36] Filed Nov. 21, 1928. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 10295.

WALVILLE LUMBER COMPANY, a Corporation,
Petitioner,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR ORDER FOR STAY OF COLLECTION.

Comes now the Walville Lumber Company, a corporation, petitioner above named, by its attorneys, Andrew G. Elder and Joseph Nievinski, and hereby petitions for a stay of the collection of the deficiency determined in the above case, and shows to the Board as follows:

I.

That on May 31, 1928, there was entered and filed herein an order of redetermination ordering and deciding that there is a deficiency for the year 1919 in the amount of \$7,514.86.

II.

That the petitioner is now taking appropriate steps for an appeal from said order of redetermination to the United States Circuit Court of Appeals for the Ninth Circuit.

[37] III.

That under date of May 7, 1925, the additional 1919 income tax was assessed under Section 274 (d) of the Revenue Act of 1924; that under date of May 14, 1925, the Collector of Internal Revenue for the District of Washington and Alaska issued his original notice and demand covering this additional assessment in the sum of \$7,514.86; that on May 23, 1925, the Walville Lumber Company filed with the said Collector an abatement claim and on said date filed with said Collector a jeopardy bond in the sum of \$8,000.00 signed by the Wal-

ville Lumber Company, as principal, and the Independence Indemnity Company, as surety, which bond was approved by the said Collector. The said bond and claim for abatement were accepted by the said Collector in accordance with Section 279 (a) of the Revenue Act of 1924 and said bond is now on file in the office of said Collector and is now and will continue to remain in full force and effect until such time as the said deficiency has been satisfactorily adjusted. That there is attached to the original of this petition the original certificate of Burns Poe, Collector of Internal Revenue for the District of Washington and Alaska, as evidence of the matters in this paragraph recited, and there is attached to the copies of this petition true copies of said original certificate.

WHEREFORE, your petitioner prays for an order of this Board staying the collection of the deficiency determined [38] by the Board in this proceeding, as provided in subdivision (c) of Section 1001 of the Revenue Act of 1926 as amended by Section 603 of the Revenue Act of 1928.

ANDREW G. ELDER,
JOSEPH NIEVINSKI,
Attorneys for Petitioner.

Denied for lack of jurisdiction to issue an order as prayed.

Nov. 21, 1928.

B. H. LITTLETON,
Member.

[39] State of Washington,
County of King,—ss.

Andrew G. Elder, being first duly sworn, on oath deposes and says that he is one of the attorneys for the petitioner in the above-entitled matter; that he has read the within and foregoing petition, knows the contents thereof and believes the same to be true.

ANDREW G. ELDER.

Subscribed and sworn to before me this 16th day of November, 1928.

EUGENE H. KNAPP,
Notary Public in and for the State of Washington,
Residing at Seattle.

[40] TREASURY DEPARTMENT.

Internal Revenue Service.

Tacoma, Washington.

Nov. 13, 1928.

Office of the Collector,
District of Washington.

Walville Lumber Co.,

c/o Elder & Nievinski,

Dexter Horton Bldg., Seattle, Wash.

Gentlemen: We are in receipt of a letter from Elder & Nievinski acting as your attorneys, dated November 8, 1928, and relating to outstanding 1919 income tax due from you. The information requested by Mr. Nievinski is submitted as follows:

1—The additional 1919 income tax was assessed on May 7, 1925, under Section 274-D of the Revenue Act of 1924.

2—The date of our original notice and demand covering this additional assessment was made May 14, 1925.

3—The amount of the assessment is \$7,514.86 and is for income tax for the calendar year 1919.

4—An abatement claim was filed by the company in this office on May 23, 1925.

5—A surety bond was filed in connection with the account in this office on May 23, 1925. This bond in the principal sum of \$8,000.00 signed by the Walville Lumber Company as principal and the Independence Indemnity Company as surety, was approved by this office.

7—As this deficiency assessment was made under Section 274-D of the 1924 Act, the bond and claim for abatement were accepted by this office in accordance with Section 279-A of the Revenue Act of 1924. The aforesaid bond is on file in this office and is now and will continue to remain in full force and effect until such time as the account has been satisfactorily adjusted and the surety company advised of the termination of its liability on the bond.

I hereby certify that the foregoing information was compiled from the records of my office and that the same truly reflects such record in so far as this additional 1919 income tax assessment is concerned.

(Signed) BURNS POE,
Collector of Internal Revenue for the District of
Washington and Alaska.

EMB: ML.

Enc.

Now, January 26, 1929, the foregoing petition for order to stay collection certified from the record as a true copy.

[Seal]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

[41] Filed Nov. 23, 1928. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 10295.

WALVILLE LUMBER COMPANY, a Corporation,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR REVIEW OF DECISION OF
THE UNITED STATES BOARD OF TAX
APPEALS.

To the Honorable, the Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:

The Walville Lumber Company, a corporation, the petitioner in the above-entitled action, conceiving itself aggrieved by the findings of fact, opinion, decision, and order of redetermination entered against it and in favor of the respondent, the commissioner of internal revenue, which decision was promulgated and filed under date of May 28, 1928,

and which order of redetermination was made, entered and filed on May 31, 1928, hereby in pursuance of the provisions of Section 1001 of the Act of Congress approved February 26, 1926, entitled the Revenue Act of 1926, respectfully petitions the above-entitled court for a review of the said findings of fact, opinion, decision and order of redetermination, and respectfully shows to this Honorable Court as follows:

[42] I.

STATEMENT OF THE NATURE OF THE
CONTROVERSY.

1. Prior to the enactment of the Revenue Act of 1926 the petitioner filed with the United States Board of Tax Appeals in pursuance of the provisions of the Revenue Act of 1924, its petition requesting the redetermination of a deficiency in income and profits taxes for the calendar year 1919 amounting to \$7,514.86, as shown by the final notice of deficiency previously mailed by the respondent to the petitioner under date of November 9, 1925.

2. The hearing was had before the Board upon the said petition and upon an answer of the respondent.

3. The petition alleged that the petitioner was organized in the year 1908 under the laws of the State of Washington with an authorized capital stock of \$1,000,000.00, consisting of 10,000 shares of the par value of \$100.00 each, and that the petitioner's office and principal place of business was

located at Walville, Washington. These allegations were admitted by the answer.

4. The petitioner further alleged that in exchange for all of the said authorized capital stock and the assumption of certain liabilities, the petitioner acquired certain property, including 4,400 shares, par value \$440,000.00, of the capital stock of the Walworth & Neville Manufacturing Company; that the assets so acquired had a fair value of \$170,329.46 in excess of the par value of the shares of stock issued therefor [43] and the liabilities assumed; that during the year 1919 the capital stock of the petitioner was reduced without consideration from \$1,000,000.00 to \$500,000.00, the latter consisting of 2,500 shares of common and 2,500 shares of preferred of the par value of \$100.00 each; that prior to the reduction of the capital stock of the petitioner, the Walworth & Neville Manufacturing Company was the owner or holder of 5,541 shares of stock in the petitioner corporation, and that upon the said reduction of the capital stock of the petitioner, if the stock were distributed to petitioner's stockholders, the manufacturing company would have received $1,385\frac{1}{4}$ shares of common and $1,385\frac{1}{4}$ shares of preferred stock that no certificate or certificates evidencing the reduced shares of stock of the petitioner were ever issued to the Walworth & Neville Manufacturing Company, but instead thereof, certificates for $1,385\frac{1}{4}$ shares of preferred stock were issued to the preferred stockholders of the Walworth & Neville Manufacturing Company and $629\frac{1}{4}$ shares of the common stock

of the petitioner were issued directly to certain stockholders of the Walworth & Neville Manufacturing Company other than the petitioner; that there remained unissued of the petitioner's reduced stock, 756 shares of common; that thereafter the Walworth & Neville Manufacturing Company, in which petitioner then owned 4,400 shares of stock with a par value of \$440,000.00, was formally dissolved. All of the foregoing allegations are admitted by the respondent's answer.

[44] 5. The petition further alleged that at the date of the dissolution of the Walworth & Neville Manufacturing Company it had no assets and hence its stockholders, including the petitioner, received nothing as a liquidating dividend. This allegation is denied by the respondent.

6. The petition further alleged that the 4,400 shares of stock of the Walworth & Neville Manufacturing Company owned by the petitioner were acquired at a cost of \$440,000.00 and had a fair market value at the basic date of March 1, 1913, of \$225,967.28, which allegations are admitted by the answer.

7. The petition further alleged that in computing the net income of the petitioner for the year 1919 there was taken into account as a tentatively determined loss the amount of \$74,400.00 with respect to the petitioner's investment in the 4,400 shares of stock of the Walworth & Neville Manufacturing Company, which is admitted in the answer.

8. It is set out that the Commissioner disallowed the deduction of the said loss from the taxpayer's gross income for the reason that the loss resulted from the taxpayer's exchanging shares of its own stock for shares of stock in the other corporation and then in the year 1919 receiving back a portion of the shares of its own stock in exchange for the shares of stock held in the other company.

9. In its petition the petitioner assigned two assignments of error, only one of which was urged before the Board, [45] to wit: That the Commissioner of Internal Revenue erred in disallowing the loss sustained with respect to the investment of the petitioner in the 4,400 shares of stock of the Walworth & Neville Manufacturing Company which had been acquired in the year 1908 at a cost of \$440,000.00 and had a value at the basic date of March 1, 1913, of \$225,967.28, which loss represented the value at the basic date in excess of the amount received for said shares of stock upon the dissolution of the Walworth & Neville Manufacturing Company.

10. The cause being at issue under the rules of practice of said Board upon the filing of the respondent's answer duly came on for hearing at Seattle, Washington, on June 13, 1927, at which time the petitioner by competent witnesses submitted testimony in support of the allegations as aforesaid. Testimony at the hearing showed that the 756 shares of the Walville Lumber Company, which remained unissued after the reduction of the capital stock of the Walville Lumber Company, was

the proportionate amount of Walville Lumber Company stock which its holdings in the Walworth & Neville Manufacturing Company would have entitled it to receive on the distribution of the assets of the latter corporation if the said 756 shares of common stock had actually been issued. Thereafter, on May 29, 1928, the said Board rendered its findings of fact, together with an opinion in which it held that the petitioner sustained no deductible loss in the year 1919 with respect to its investment in the 4,400 shares of stock of the Walworth & Neville Manufacturing Company.

[46] 11. Thereafter, on May 31, 1928, the Board entered its final order of redetermination ordering and deciding that there was a deficiency for the year 1919 in the sum of \$7,514.86.

II.

DESIGNATION OF COURT OF REVIEW.

The petitioner is a corporation organized and existing under and by virtue of the laws of the State of Washington, with its principal place of business and principal office located at Walville, Washington.

The petitioner made its income and profits tax return for the year 1919 to the Collector of Internal Revenue at Tacoma, Washington. The petitioner being aggrieved by the findings of fact, opinion, and order of redetermination of the Board, desires a review thereof in accordance with the provisions of the Revenue Act of 1926 by the United

States Circuit Court of Appeals for the Ninth Circuit.

III.

ASSIGNMENTS OF ERROR SEPARATELY STATED AND NUMBERED IN RESPECT OF EACH AND EVERY ERROR AS- SERTED AND INTENDED TO BE AR- GUED.

The decision, order, and judgment made and entered in the above-entitled cause on May 31, 1928, in favor of the respondent and against the petitioner is erroneous and against the just rights of said petitioner, and as a basis for review of said decision, order and judgment, petitioner makes the following assignments of error, which said petitioner avers occurred upon [47] the trial of said cause and upon which assignments of error the petitioner relies as a basis of this proceeding:

(1)

The Board erred in entering the order of re-determination made and entered on May 31, 1928, and in finding and deciding that there is a deficiency for the year 1919 in the amount of \$7,514.86.

(2)

The Board erred in finding as a fact that upon the completion of the reorganization of the petitioner, Walville Lumber Company, the Walworth & Neville Manufacturing Company had as assets, an interest in the stock of the petitioner, there being no evidence in the record to support any such finding, and there being no competent evidence offered or

received at the hearing tending to prove the allegations of said finding of fact, and said allegations of said finding of fact were and are against the preponderance of the evidence.

(3)

The Board erred in its conclusion in its decision and opinion promulgated May 28, 1928, to the effect that if the petitioner had issued to the Walworth & Neville Manufacturing Company the 1,385 $\frac{1}{4}$ shares of preferred stock and the 1,385 $\frac{1}{4}$ shares of common stock of the petitioner to which the manufacturing company was entitled, and if after such issue the Walworth & Neville Manufacturing Company had distributed such issue as a liquidating dividend, the petitioner as the owner of 4,400 [48] of the 9,000 outstanding shares of stock of the Walworth & Neville Manufacturing Company would have received back 1,354 $\frac{1}{4}$ shares of its own stock and other owners of the stock of the Walworth & Neville Manufacturing Company would have received the remainder or 1,416 shares, there being no evidence in the record to support any such finding, and there being no competent evidence offered or received at the hearing to prove the allegations of the said finding of fact and conclusion, and said allegations of said finding of fact and conclusion were and are against the preponderance of the evidence and the said conclusion and the whole thereof is not supported by the findings of fact or the evidence herein.

(4)

The Board erred in failing and refusing to find

and adopt petitioner's requested finding of fact number one.

(5)

The Board erred in failing and refusing to find and adopt petitioner's requested finding of fact number two.

(6)

The Board erred in failing and refusing to find and adopt petitioner's requested finding of fact number five.

(7)

The Board erred in failing and refusing to find and adopt petitioner's requested finding of fact number six.

(8)

The Board erred in its conclusion that the petitioner sustained no loss in the year 1919 with respect to its investment in the 4,400 shares of stock of the Walworth & Neville [49] Manufacturing Company which were purchased and paid for by the petitioner in 1908 and which had become worthless within the year 1919.

(9)

The Board erred in entering the order of redemption made and entered on May 31, 1928, for the reason that the same is not supported by the findings of fact herein nor by any evidence herein.

(10)

The Board erred in failing and refusing to enter an order in favor of the petitioner ordering and

deciding that there was and is no deficiency in income and profits taxes for the year 1919.

WHEREFORE, your petitioner prays that this Honorable Court may review said findings, decision, opinion, and order of redetermination and reverse and set aside the same, and that the Clerk of the said United States Board of Tax Appeals be directed to transmit and deliver to the Clerk of said Circuit Court of Appeals certified copies of all and every of the documents necessary and material to the presentation and consideration of the foregoing petition for review and as required by the rules of said court and statutes made and provided.

And your petitioner will ever pray.

WALVILLE LUMBER COMPANY, a Corporation,

By ANDREW G. ELDER,
Its Attorney.

ANDREW G. ELDER,
JOSEPH NIEVINSKI,
Attorneys for Petitioner,
Dexter Horton Building,
Seattle, Washington.

[50] State of Washington,
County of King,—ss.

Andrew G. Elder, being first duly sworn, on oath deposes and says that he is one of the attorneys of record for the petitioner, Walville Lumber Company, a corporation, and that as such he had authority to and did sign the foregoing petition; that

he has read the same, and that the facts set forth therein are true to the best of his knowledge and belief; and that the said petition is filed in good faith.

ANDREW G. ELDER.

Subscribed and sworn to before me this 10 day of November, 1928.

[Seal] EUGENE H. KNAPP,
Notary Public in and for the State of Washington,
Residing at Seattle.

Copy of the within petition for review of decision of the United States Board of Tax Appeals is hereby acknowledged this 23 day of November, 1928.

C. M. CHAREST,
H.,
General Counsel,
Bureau of Internal Revenue,
Attorney for Respondent.

[51] Filed Nov. 22, 1928. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 10295.

WALVILLE LUMBER COMPANY, a Corporation,
Petitioner,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

NOTICE OF FILING OF PETITION FOR
REVIEW OF DECISION OF UNITED
STATES BOARD OF TAX APPEALS.

To the Commissioner of Internal Revenue, Respondent Above Named, and to C. M. Charest, General Counsel, Bureau of Internal Revenue, His Attorney:

Notice is hereby given that Walville Lumber Company, a corporation, the petitioner above named, has filed with the United States Board of Tax Appeals a petition for a review of the decision of the United States Board of Tax Appeals made and filed on May 28, 1928, and the order of final redetermination made and entered on the 31st day of May, 1928, in the case of the Walville Lumber Company, a Corporation, Petitioner, vs. Commissioner of Internal Revenue, Respondent, Docket No. 10295, of the said Board.

ANDREW G. ELDER,
JOSEPH NIEVINSKI,
Attorneys for Petitioner,
Dexter Horton Building,
Seattle, Washington.

[52] Copy of the within notice and copy of the petition for review after filing of the original thereof with the Clerk of the Board of Tax Ap-

peals is hereby acknowledged this 23 day of November, 1928.

C. M. CHAREST,
H.,
General Counsel,
Bureau of Internal Revenue,
Attorney for Respondent.

Now, January 26, 1929, the foregoing petition for review and notice of filing certified from the record as a true copy.

[Seal]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

[53] United States Board of Tax Appeals.

DOCKET No. 10295.

WALVILLE LUMBER COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ORDER INCORPORATING PETITIONER'S
AMENDMENT LODGED WITH THE
BOARD DECEMBER 10, 1928, IN THE
STATEMENT OF THE EVIDENCE
LODGED WITH THE BOARD ON NO-
VEMBER 23, 1928.

On November 23, 1928, petitioner, in the above-entitled proceeding, lodged with the Board a pro-

posed statement of the evidence, to which the respondent filed objections on December 3, 1928. Thereafter, on December 10, 1928, petitioner lodged with the Board an amendment to the proposed statement of the evidence and, at a hearing had thereon, on December 10, 1928, there was no objection to the amendment offered. The parties having agreed that such amendment disposes of the respondent's objections, filed on December 3, 1928, it is

ORDERED: That the amendment, be, and the same is hereby, incorporated in the statement of the evidence lodged with the Board on November 23, 1928, which will be submitted for certification.

Dated, Washington, D. C., December 11, 1928.

W. C. LANSDON,

Member, United States Board of Tax Appeals.

Now, January 26, 1929, the foregoing order incorporating petitioner's amendment in statement of evidence certified from the record as a true copy.

[Seal]

B. D. GAMBLE,

Clerk U. S. Board of Tax Appeals.

A true copy.

Teste: B. D. GAMBLE,

Clerk U. S. Board of Tax Appeals.

[54] Filed Nov. 23, 1928. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 10295.

WALVILLE LUMBER COMPANY, a Corpora-
tion,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

NOTICE OF LODGMENT OF STATEMENT OF
EVIDENCE.

To the Commissioner of Internal Revenue Above
Named and to C. M. Charest, General Counsel,
Bureau of Internal Revenue.

Sirs: You, and each of you, will please take notice that the statement of the evidence of the petitioner on review in this cause (a copy of which statement of the evidence is herewith served upon you) has this day been lodged in the office of the Clerk of the United States Board of Tax Appeals for your examination, and you, and each of you, are hereby notified that on the 10th day of December, 1928, in the hearing rooms of this Board at 10 o'clock in the forenoon of that day, or as soon thereafter as the Board may designate and hearing may be had, we will ask the Honorable W. C. Lansdon, Member of the United States Board of Tax Appeals, to approve said statement as the statement of evidence in this proceeding.

[55] You are further requested that if you have any objections or amendments to propose to the petitioner's proposed statement of the evidence in this proceeding, to serve the same or a copy thereof on or before the 29th day of November, 1928, on William M. Smith, care of Price, Waterhouse & Company, National Press Building, Washington, D. C.

Dated this 13th day of November, 1928.

ANDREW G. ELDER,
JOSEPH NIEVINSKI,
Attorneys for Petitioner,
Dexter Horton Building.
Seattle, Washington.

Service accepted this 23d day of November, 1928.

C. M. CHAREST,
A.,
General Counsel,
Bureau of Internal Revenue.

[56] Filed Dec. 10, 1928. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 10295.

WALVILLE LUMBER COMPANY, a Corporation,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

NOTICE OF LODGMENT OF AMENDMENT
TO THE STATEMENT OF THE EVIDENCE.

To the Commissioner of Internal Revenue Above
Named and to C. M. Charest, General Counsel,
Bureau of Internal Revenue:

Sirs: You, and each of you, will please take notice that the amendment to the statement of the evidence of the petitioner on review in this cause (a copy of which amendment to the statement of the evidence is herewith served upon you) has this day been lodged in the office of the Clerk of the United States Board of Tax Appeals for your examination and you and each of you, are hereby notified that on the 10th day of December, 1928, in the hearing rooms of this Board at 10 o'clock in the forenoon of that day, or as soon thereafter as the Board may designate and hearing may be had, we will ask the Honorable W. C. Lansdon, Member of the United States Board of Tax Appeals, to approve said amendment to the statement of the evidence in this proceeding.

[57] You are further requested that if you have any objections or amendments to propose to the petitioner's proposed amendment to the statement of the evidence in this proceeding, to serve the same or a copy thereof on or before the 10th day of December, 1928, on William M. Smith, Care of Price, Waterhouse & Company, National Press Building, Washington, D. C.

Dated this 10th day of December, 1928.

ANDREW G. ELDER,
JOSEPH NIEVINSKI,
Attorneys for Petitioner,
Dexter Horton Building,
Seattle, Washington.

Service accepted this 10th day of December, 1928.

C. M. CHAREST,
H.

General Counsel, Bureau of Internal Revenue.

[58] No objection or amendment will be made by the Commissioner of Internal Revenue and/or C. M. Charest, General Counsel, Bureau of Internal Revenue to the petitioner's foregoing proposed amendment to the statement of the evidence.

D. H. BLAIR,
Commissioner of Internal Revenue.

C. M. CHAREST,
H.

General Counsel,
Bureau of Internal Revenue.

Dated at Washington, D. C., this 10th day of December, 1928.

[59] Lodged Nov. 23, 1928.

United States Board of Tax Appeals.

DOCKET No. 10295.

WALVILLE LUMBER COMPANY, a Corpora-
tion,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

LODGMENT OF PETITIONER'S STATE-
MENT OF THE EVIDENCE.

Comes now the petitioner, Walville Lumber Company, a corporation, by its attorneys, Andrew G. Elder and Joseph Nievinski, and hereby lodges with the Clerk of the United States Board of Tax Appeals the petitioner's statement of the evidence, together with four (4) conformed copies thereof, said statement of evidence to be settled by the Honorable W. C. Lansdon, Member of the United States Board of Tax Appeals, as provided by the rules of the United States Circuit Court of Appeals for the Ninth Circuit and by the rules of the United States Board of Tax Appeals.

ANDREW G. ELDER,
JOSEPH NIEVINSKI,
Attorneys for Petitioner.

[60—1] United States Board of Tax Appeals.

DOCKET No. 10295.

WALVILLE LUMBER COMPANY, a Corporation,
tion,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

STATEMENT OF THE EVIDENCE.

BE IT REMEMBERED that on the 13th day of June, 1927, at Seattle, Washington, the above-entitled cause came on for hearing before the Honorable W. C. Lansdon, Member of the United States Board of Tax Appeals, the petitioner appearing by its attorneys, Andrew G. Elder, Matthew W. Hill, and Eugene H. Knapp, and the respondent appearing by his attorneys, Henry Ravenel and A. W. Gregg, General Counsel, Bureau of Internal Revenue.

Whereupon the following proceedings were had:

TESTIMONY OF JOHN H. NEVILLE, FOR PETITIONER.

JOHN H. NEVILLE, having been called by the petitioner as a witness, being first duly sworn, testified as follows:

He resided at Walville, Washington, his business being that of a lumberman; he was connected with

(Testimony of John H. Neville.)

the Walville Lumber Company and at the time of the hearing was [61—2] president and general manager of the company; during the year 1919 he was vice-president of that company and in the latter part of the year became treasurer and general manager.

During the year 1919 J. C. Neville, the president of the company, died.

The Walville Lumber Company was a corporation of the State of Washington and in the year 1919 owned shares of stock in the Walworth & Neville Manufacturing Company.

He was also a stockholder and director in the Walworth & Neville Manufacturing Company during the year 1919.

The Walworth & Neville Manufacturing Company was incorporated under the laws of the State of Michigan.

The Walville Lumber Company owned 4,400 shares of stock in the Walworth & Neville Manufacturing Company which had been acquired at the time of the incorporation of the Walville Lumber Company. The original cost of this stock in 1908 to the petitioner was \$440,000.00 (which amount was admitted in respondent's answer). The value of said shares of stock as of March 1, 1913, was \$225,967.28 (which amount was admitted in respondent's answer).

In the year 1919 the Walworth & Neville Manufacturing Company owned 5,541 shares of stock in the Walville Lumber Company.

(Testimony of John H. Neville.)

The capital stock of the Walville Lumber Company was reduced in the year 1919, without consideration, from a par value of \$1,000,000.00 common stock to an authorized issue of \$250,000.00 preferred and \$250,000.00 common.

[62—3] The Walworth & Neville Manufacturing Company was dissolved in the year 1919.

Early in the year 1919 that active officers of the Walworth & Neville Manufacturing Company approached the management of the Walville Lumber Company with the proposal that the latter company do something which would enable the Manufacturing Company to wind up its affairs. The Manufacturing Company turned to the Lumber Company principally because the former's holdings of the latter's stock were all that the former had left in the way of assets. At that time the Walworth & Neville Manufacturing Company had outstanding an issue of preferred stock which was cumulative in respect of dividends and they asked the Walville Lumber Company to so arrange the stock issues that the Manufacturing Company might satisfy primarily its preferred stockholders. The Walville Lumber Company thereupon followed this proposal. Its stock was first reduced in quantity to \$500,000.00 par value, which was divided into \$250,000.00 common and \$250,000.00 preferred. Because of the Manufacturing Company's holdings in the Walville Lumber Company, the former received a portion of the preferred stock which it in turn was able to use in satisfying the claims of its preferred

(Testimony of John H. Neville.)

stockholders. The Walville Lumber Company issued all of its preferred stock and all of its common stock except 756 shares which remained unissued. Thereafter, the Walworth & Neville Manufacturing Company was dissolved, having no assets on hand. At the request of the Walworth & Neville [63—4] Manufacturing Company the preferred stock and the common stock which it had coming to it from the Walville Lumber Company was issued directly to the stockholders of the Walworth & Neville Manufacturing Company.

The 756 shares of common stock which were never issued by the Walville Lumber Company was the amount of stock which the Walville Lumber Company would have received if it had issued to the Walworth & Neville Manufacturing all of the stock that was due that company and then a liquidation of that company had taken place. In other words, the 756 shares of the Walville Lumber Company stock which were never issued after the reduction of the capital stock of the Walville Lumber Company was the proportionate amount of the Walville Lumber Company's stock which its holdings in the Walworth & Neville Manufacturing Company would have entitled it to receive on the disposition of the assets of that corporation.

The income and profits tax return of the Walville Lumber Company for the year 1919 was made by the witness and was signed by him together with J. D. Wilson. The said return was thereupon iden-

(Testimony of John H. Neville.)

tified and offered and received in evidence, without objection, as Petitioner's Exhibit No. 1.

The witness further testified: That Line 22, under Schedule A, gross income, of Petitioner's Exhibit No. 1, reading "Profit or loss on sales of capital assets and miscellaneous investments, including liquidating dividends," showed a computation of a loss in the sum of \$74,400.00.

[64—5] On cross-examination the said witness testified as follows:

The acquisition of the 4,400 shares of stock of the Walworth & Neville Manufacturing Company which the Walville Lumber Company owned in 1919 was made by the Lumber Company before the witness' active participation in the management of the Lumber Company. He inherited the understanding that the stock of the Walworth & Neville Manufacturing Company which the Walville Lumber Company acquired in 1908 was paid for in full and that it was worth the full amount. The payment, he believed, was in the form of stock. The 756 shares of the common stock of the Walville Lumber Company which were not issued in 1919 represented the Lumber Company's proportion of the assets of the Walworth & Neville Manufacturing Company on dissolution. The reason why it was not issued was that it seemed like the better thing for the Walville Lumber Company to do, to have the 756 shares as unissued stock rather than treasury stock. There was no point in issuing the

(Testimony of John H. Neville.)

stock and it gave the Lumber Company the advantage of keeping it as unissued stock.

On redirect examination the witness testified that instead of the Walville Lumber Company having acquired the 4,400 shares of stock of the Walworth & Neville Manufacturing Company for shares of its own stock, it acquired those 4,400 shares of stock, plant and timber land in exchange for its own shares of stock and the assumption of bonded and other indebtedness.

[65—6] TESTIMONY OF FRED NORTH,
FOR PETITIONER.

FRED NORTH was thereupon called as a witness for the petitioner and being first duly sworn, testified as follows:

He was Internal Revenue Agent at Seattle, Washington, and had been an Internal Revenue Agent since November 26, 1920. Prior to that time he was an accountant for different corporations. During the course of his duties as Internal Revenue Agent, he examined the records of the Walville Lumber Company for the year 1919. His attention having been called to Line 22 in Schedule A, gross income, of Petitioner's Exhibit No. 1, he testified that he made a change in the return which showed a loss of \$74,400.00 by increasing the amount of the deductible loss. He computed the value of the 4,400 shares of stock of the Manufacturing Company owned by the Lumber Company to be \$225,967.28

(Testimony of Fred North.)

as of March 1, 1913. The 756 shares of the Walville Lumber Company which were unissued in the year 1919 had a value of \$107,197.53. By subtracting the latter amount from the first amount he arrived at a deductible loss of \$118,769.75. There was no cross-examination of this witness.

TESTIMONY OF JOSEPH B. BANTON, FOR PETITIONER.

JOSEPH B. BANTON was thereupon called as a witness on behalf of the petitioner and being first duly sworn, testified as follows:

He resided at Walville, Washington, and was secretary and treasurer of the Walville Lumber Company and had charge of the financial and other records of that company relating to the [66—7] reduction of its capital stock in the year 1919. He thereupon identified Petitioner's Exhibit No. 2 for Identification as a statement of the capital stock of the Walville Lumber Company, the balance sheet from January 1, 1913, to December 31, 1919. Thereupon the said exhibit was offered and received in evidence as Petitioner's Exhibit No. 2. Petitioner's Exhibit No. 2 showed that on January 1, 1919, the credit balance of the capital stock outstanding was \$1,000,000.00. On December 31, 1919, capital stock was charged to deficit account \$1,000,000.00, leaving no balance.

Petitioner's Exhibit No. 3 was thereupon offered and received in evidence without objection. This exhibit is the ledger statement representing the

(Testimony of Joseph B. Banton.)

common stock of the Walville Lumber Company and under date of December 31, 1919, shows a credit balance of \$174,400.00.

Petitioner's Exhibit No. 4 was then offered and received in evidence without objection. This is the ledger sheet of the Walville Lumber Company representing its deficit account for the year 1919. Debit account was charged with preferred stock \$250,000.00. It was credited with the capital stock of \$1,000,000.00. It was charged with common stock of \$174,400.00. It was charged with surplus of \$119,228.09.

On cross-examination the witness testified that he was not connected with the company in the year 1919.

JOHN H. NEVILLE, RECALLED BY RESPONDENT.

Thereafter JOHN H. NEVILLE was recalled by counsel for the Commissioner and testified that in 1919 on the dissolution [67—8] of the Walworth & Neville Manufacturing Company, the Walville Lumber Company surrendered its stock in that corporation.

The petitioner thereupon rested its case.

TESTIMONY OF FRED NORTH, FOR RESPONDENT.

FRED NORTH was thereupon called as a witness on behalf of the respondent but objection was sustained to the questions asked of the witness. No

testimony was offered on behalf of the respondent and the respondent thereupon rested.

The foregoing is the substance of all the evidence adduced at the hearing of this proceeding.

The Board took the case under advisement and on May 28, 1928, made and filed its findings of fact and opinion herein. Thereafter, on May 31, 1928, an order of redetermination was entered herein finding a deficiency for the year 1919 in the sum of \$7,514.86.

CERTIFICATE OF MEMBER OF UNITED
STATES BOARD OF TAX APPEALS TO
STATEMENT OF THE EVIDENCE.

And now because the foregoing matters and things are not of record in this cause, I, W. C. Lansdon, Member of the United States Board of Tax Appeals and the Member Presiding at the hearing of the above-entitled proceeding at Seattle, Washington, do hereby certify that the foregoing statement of the evidence contains the substance of all the [68—9] evidence given on the hearing of this proceeding and each of the exceptions stated to have been taken by the attorneys for the petitioner were so taken and were duly allowed and noted by the Board; and in order that each and every one thereof may be preserved and made of record, this statement of the evidence is hereby duly stated, approved and signed and ordered to be made of record in the above-entitled cause. Said statement of the evidence was duly prepared and submitted within the time allowed by the rules of this Board, and by the

rules of the United States Circuit Court of Appeals for the Ninth Circuit, and is now signed and settled as and for the statement of the evidence in the above-entitled proceeding.

Dated at Washington, D. C., this 11 day of December, 1928.

W. C. LANSDON,
Member, United States Board of Tax Appeals.

This approval is understood to be conditioned upon the addition hereto of the amendment to the statement of evidence which has been agreed to by counsel for the parties.

W. C. LANSDON.

[69] United States Board of Tax Appeals.

DOCKET No. 10,295.

WALVILLE LUMBER COMPANY, a Corpora-
tion,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

AMENDMENT TO THE STATEMENT OF THE
EVIDENCE.

Comes now the petitioner and prays the United States Board of Tax Appeals to enter its order amending the statement of the evidence filed in the above cause with said United States Board of Tax Appeals on November 23, 1928, starting at the top

of page seven (7) and ending at the bottom of page seven (7) only; to read as follows:

[70] “reduction of its capital stock in the year 1919. He thereupon identified Petitioner’s Exhibit No. 2 for identification as a statement of the capital stock of the Walville Lumber Company, the balance sheet from January 1, 1913, to December 31, 1919. Thereupon, the said exhibit was offered and received in evidence as Petitioner’s Exhibit No. 2. Petitioner’s Exhibit No. 2 showed that on January 1, 1919, the credit balance of the capital stock outstanding was \$1,000,000.00. On December 31, 1919, capital stock was charged to deficit account \$1,000,000.00, leaving no balance.

Petitioner’s Exhibit No. 3 was thereupon offered and received in evidence without objection. This exhibit is the ledger statement representing the common stock of the Walville Lumber Company and under date of December 31, 1919, shows a credit balance of \$174,400.00.

Petitioner’s Exhibit No. 4 was then offered and received in evidence without objection. This is the ledger sheet of the Walville Lumber Company representing the preferred stock, that is, the reissued preferred stock, in the sum of \$250,000.00, and the entries thereon show under date of December 31, 1919, a credit balance of \$250,000.00.

Petitioner’s Exhibit No. 5 was then offered and received in evidence without objection. This is the ledger sheet of the Walville Lumber Company representing its deficit account for the year 1919. Deficit account was charged with preferred stock \$250,-

000.00. It was credited with the capital stock of \$1,000,000.00. It was charged with common stock of \$174,400.00. It was charged with surplus of \$119,228.09.

On cross-examination the witness testified that he was not connected with the company in the year 1919.

JOHN H. NEVILLE, RECALLED BY RE-
SPONDENT.

Thereafter JOHN H. NEVILLE was recalled by counsel for the Commissioner and testified that in 1919 on the dissolution [7]''

[71] Dated this 10th day of December, 1928.

ANDREW G. ELDER,

JOSEPH NIEVINSKI,

Attorneys for Petitioner,

Dexter Horton Building,

Seattle, Washington.

O. K.—W. C. LANSDON.

Now, January 26, 1929, the foregoing statement of evidence and amendment thereto with notice of lodgment of statement and notice of lodgment of amendment certified from the record as a true copy.

[Seal]

B. D. GAMBLE,

Clerk U. S. Board of Tax Appeals.

[72] Filed Jan. 10, 1929. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 10,295.

WALVILLE LUMBER COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

STIPULATION RE FORWARDING ORIGINAL EXHIBITS TO CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto, by their respective attorneys, that the original exhibits introduced by the parties to this action upon the hearing of said cause be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit.

ANDREW G. ELDER,

JOSEPH NIEVINSKI,

Attorneys for Petitioner.

(Sgd.) C. M. CHAREST.

C. M. CHAREST,

General Counsel,

Bureau of Internal Revenue.

ORDER RE TRANSMISSION OF ORIGINAL
EXHIBITS.

[73] On the above stipulation of the parties,—
IT IS HEREBY ORDERED that the original exhibits introduced by the parties to this action upon the hearing of said cause before the Board be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit for use by said Appellate Court in connection with the review taken from the Board's decision; said exhibits to be returned to the files of the Board at the conclusion of the hearing on review.

(Signed) W. C. LANSDON,

Member, U. S. Board of Tax Appeals.

Dated Washington, D. C., January 28, 1929.

Now, January 26, 1929, the foregoing stipulation and order certified from the record as a true copy.

[Seal]

B. D. GAMBLE,

Clerk, U. S. Board of Tax Appeals.

[74] Filed Jan. 10, 1929. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 10,295.

WALVILLE LUMBER COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PRAECIPE FOR TRANSCRIPT OF RECORD
ON REVIEW OF DECISION OF UNITED
STATES BOARD OF TAX APPEALS.

To the Clerk of the United States Board of Tax Appeals:

You will please prepare a transcript of the complete record in the above-entitled cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit under the petition for review of decision of the United States Board of Tax Appeals heretofore perfected herein, and include in said transcript the following proceedings, papers, records and files, to wit:

1. All docket entries of proceedings before the Board.
2. All pleadings before the Board.
3. Findings of fact, opinion and decision of the Board promulgated under date of May 28, 1928.
4. Order of redetermination entered May 31, 1928.
5. Petitioner's exceptions.
6. Petition for order for stay of collection.
7. Petition for review of decision of the United states Board of Tax Appeals.
- [75] 8. Notice of filing of petition for review of decision of United States Board of Tax Appeals.
9. Notice of lodgment of statement of evidence.
10. Notice of lodgment of amendment to the statement of the evidence.

11. Order incorporating petitioner's amendment lodged with the Board December 10, 1928, in the statement of the evidence lodged with the Board on November 23, 1928.
12. The statement of the evidence as settled and agreed upon.
13. Stipulation *re* forwarding original exhibits to Circuit Court of Appeals for the Ninth Circuit and order *re* forwarding original exhibits to Circuit Court of Appeals for the Ninth Circuit.
14. This praecipe and any and all records, entries, minutes, orders, papers, proceedings, and files necessary or proper to make a complete transcript of the record of said cause in said United States Board of Tax Appeals as required by law and the rules of the Board and the United States Circuit Court of Appeals for the Ninth Circuit.

ANDREW G. ELDER,
JOSEPH NIEVINSKI,
Attorneys for Petitioners.

Due and sufficient service of foregoing praecipe is hereby acknowledged this 2d day of January, 1929.

C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Now, January 26, 1929, the foregoing praecipe certified from the record as a true copy.

[Seal]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[Endorsed]: No. 5710. United States Circuit Court of Appeals for the Ninth Circuit. Walville Lumber Company, a Corporation, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of Record. Upon Petition to Review an Order of the United States Board of Tax Appeals.

Filed February 5, 1929.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States
Circuit Court of Appeals
For the Ninth Circuit.

WALVILLE LUMBER COMPANY, a Corpora-
tion,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Supplemental Transcript of Record.

UPON PETITION TO REVIEW AN ORDER OF THE UNITED
STATES BOARD OF TAX APPEALS.

FILED

AUG 30 1901

PAUL S. LORING,

United States
Circuit Court of Appeals
For the Ninth Circuit.

WALVILLE LUMBER COMPANY, a Corpora-
tion,

Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Supplemental Transcript of Record.

UPON PETITION TO REVIEW AN ORDER OF THE UNITED
STATES BOARD OF TAX APPEALS.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Filed Oct. 1, 1927. United States Board of Tax Appeals.

United States Board of Tax Appeals.

Docket No. 10,295.

WALVILLE LUMBER COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

REQUEST FOR FINDINGS OF FACT.

The petitioner, considering the facts hereinafter set forth to be proven, and deeming them material to the due presentation of this case in the findings of fact, requests the Board to find the same as follows:

1. The petitioner is a corporation organized and existing under the laws of the State of Washington, with its office and principal place of business at Walville, of the said state. Its original authorized capital stock of the par value of \$1,000,000.00 was issued and bonded and other indebtedness assumed as consideration for the acquisition, prior to March 1, 1913, of timber, a sawmill and cross-arm factory, machinery and equipment, etc., [1*]
2. The assets so acquired had a fair value at the date of acquisition of \$170,329.46 in excess of

*Page-number appearing at the foot of page of original certified Supplemental Transcript of Record.

the par value of the shares of stock issued and the amount of the liabilities assumed in in acquisition thereof, which said excess constituted paid-in surplus includible in statutory invested capital.

3. In the year 1919 the capital stock of the petitioner was reduced, without consideration, from \$1,000,000.00 to \$500,000.00, consisting of 2,500 shares of common and 2,500 shares of preferred, all of the par value of \$100.00 each. All of the preferred stock, par value \$250,000.00, and 1,744 shares, total par value of \$174,400.00, of the authorized common stock were issued immediately after such reduction, leaving 756 shares of the common stock, par value \$75,600.00, at all times thereafter unissued.
4. During the year 1919 the petitioner was the owner of certain shares of stock of the Walworth & Neville Manufacturing Company, a Michigan corporation, which had been acquired prior to March 1, 1913, at a cost of \$440,000.00, and had a fair value on the basic date indicated of \$225,967.28. [2]
5. In the year 1919 the Walworth & Neville Manufacturing Company was dissolved. Upon such dissolution the petitioner received nothing as a liquidating dividend from the dissolved corporation.
6. In computing net income for the year 1919 the petitioner took into account a deduction of of \$74,400.00 representing the loss, tentatively

computed, sustained with respect to its investment in shares of stock of the Walworth & Neville Manufacturing Company, not compensated for by insurance or otherwise, which loss was disallowed by the respondent, resulting in an asserted deficiency in income and profits taxes of \$7,514.86.

Respectfully submitted,
ANDREW G. ELDER,
MATHEW W. HILL,
EUGENE H. KNAPP,
Attorneys for Petitioner.

Dexter Horton Building,
Seattle, Washington,

Now, August 17, 1929, the foregoing request for findings of fact certified from the record as a true copy.

[Seal]

B. D. GAMBLE,
Clerk, Board of Tax Appeals. [3]

Filed Aug. 16, 1929. United States Board of Tax Appeals.

United States Board of Tax Appeals.

Docket No. 10,295.

WALVILLE LUMBER COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

STIPULATION REGARDING SUPPLEMENTAL TRANSCRIPT OF RECORD.

It appears that either through accident or error, the petitioner failed to designate, definitely, in its "Praeipie for Transcript of Record on Review of Decision of United States Board of Tax Appeals," which praecipe was duly filed with the Clerk of the United States Board of Tax Appeals on January 10th, 1929, that there be included in the transcript of the record for filing in the United States Circuit Court of Appeals for the Ninth Circuit, the petitioner's "Request for Findings of Fact" which were duly and regularly filed by the petitioner with the United States Board of Tax Appeals on October 1, 1927, and the petitioner believing that it is material to the petitioner that said "Request for Findings of Fact" be included in the transcript of record before the United States Circuit Court of Appeals for the Ninth Circuit, NOW THEREFORE, [4]

IT IS HEREBY STIPULATED and AGREED by and between the Walville Lumber Company, a corporation, petitioner, by and through its attorneys, Andrew G. Elder and Joseph Nievinski, and the Commissioner of Internal Revenue, respondent, above named, by and through his attorney, that the petitioner's "Request For Findings of Fact" as heretofore filed on October 1, 1927, with the United States Board of Tax Appeals, shall be duly certified as correct by the Clerk of the United States

Board of Tax Appeals, and shall be transmitted by said Clerk to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit as a supplemental transcript of record on review, and that upon the filing of said supplemental transcript with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, he may proceed to print the same, together with this stipulation as a supplemental transcript of record, and that the said supplemental transcript of record, when so printed, shall, to all intents and purposes, be considered as a part of the original transcript of record on file with the United States Circuit Court of Appeals for the Ninth Circuit, to all intents and purposes as if said petitioner's "Request For Findings of Fact" had been included in the [5] original transcript as originally prepared and certified by the Clerk of the United States Board of Tax Appeals.

ANDREW G. ELDER,

(Signed) ANDREW G. ELDER,

JOSEPH NIEVINSKI.

(Signed) JOSEPH NIEVINSKI,

Attorneys for Appellant and Petitioner.

(Signed) C. M. CHAREST,

General Counsel Bureau of Internal Revenue,

Attorney for Respondent.

Now, August 17, 1929, the foregoing stipulation certified from the record as a true copy.

B. D. GAMBLE,

Clerk, U. S. Board of Tax Appeals. [6]

[Endorsed]: No. 5710. United States Circuit Court of Appeals for the Ninth Circuit. Walville Lumber Company, a Corporation, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Supplemental Transcript of Record. Upon Petition to Review an Order of the United States Board of Tax Appeals.

Filed August 23, 1929.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Frank H. Schmid,
Deputy Clerk.

In the
**United States Circuit Court
of Appeals**

For the Ninth Circuit

Docket No. 5710

WALVILLE LUMBER COMPANY,
a corporation,
Appellant and Petitioner,

vs.

COMMISSIONER OF INTERNAL
REVENUE,
Respondent.

Brief for the Appellant and Petitioner

ANDREW G. ELDER
JOSEPH NIEVINSKI

Attorneys for Appellant and Petitioner

Dexter Horton Building
Seattle, Washington

ACME PRESS - SEATTLE

FILED

AUG 8 - 1929

PAUL P. O'BRIEN,

CLERK



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In the
**United States Circuit Court
of Appeals**

For the Ninth Circuit

Docket No. 5710

WALVILLE LUMBER COMPANY,

a corporation,

Appellant and Petitioner,

vs.

COMMISSIONER OF INTERNAL
REVENUE,

Respondent.

Brief for the Appellant and Petitioner

INTRODUCTION

This is a petition by the WALVILLE LUMBER COMPANY for Review by the United States Circuit Court of Appeals of a decision of the United States Board of Tax Appeals promulgated and filed under date of May 28, 1928, and for review of an Order of Redetermination made, entered and filed by the Board on May 31, 1928. This Petition

for Review is filed in pursuance of the provisions of Section 1001 of the Act of Congress approved February 26, 1926, entitled "The Revenue Act of 1926."

The proceeding before the United States Board of Tax Appeals resulted from the determination by the respondent, Commissioner of Internal Revenue, of a deficiency of \$7,514.86 in petitioner's income and profits taxes for the year 1919. The deficiency arises from the refusal of the respondent to allow a deduction claimed by the petitioner as a loss sustained by it on 4,400 shares of stock of the WALWORTH & NEVILLE MANUFACTURING COMPANY purchased and paid for by petitioner in 1908 and which had become worthless within the year 1919.

The petitioner relied upon the following assignment of error before the Board:

"The Commissioner of Internal Revenue erred in disallowing the loss sustained with respect to an investment in shares of stock of the WALWORTH & NEVILLE MANUFACTURING COMPANY acquired in the year 1908 at a cost of \$440,000.00, with a value at the basic date of March 1, 1913, of \$225,967.28 as determined by the Bureau of Internal Revenue, said loss representing such fair value in excess of the amount received therefor upon the dissolution of the issuing company."

STATEMENT OF FACTS

The WALVILLE LUMBER COMPANY, hereinafter sometimes also referred to as the "Lumber Company," was incorporated in the year 1908, under the laws of the State of Washington, with an authorized capital stock of \$1,000,000.00, consisting of 10,000 shares of the par value of \$100.00 each.

In the same year the petitioner acquired from the WALWORTH & NEVILLE MANUFACTURING COMPANY, a Michigan corporation, hereinafter sometimes also referred to as the "Manufacturing Company," certain timber-lands, cut-over lands, sawmill, cross-arm factory, machinery and equipment and 4,400 shares of the common stock of the said Manufacturing Company and issued therefore to various individuals its entire authorized capital stock. The value of all of this property at the date of acquisition by the petitioner was \$1,170,329.46, so that the petitioner had a paid-in surplus of \$170,329.46.

The 4,400 shares of stock acquired from the said Manufacturing Company as above set forth and owned by the petitioner on March 1, 1913, had a fair market value on that date of \$225,967.28.

The stock of the WALWORTH & NEVILLE MANUFACTURING COMPANY consisted of 8,000 shares of common stock and 1,000 shares of preferred stock, all of the par value of \$100.00 per

share. In the year 1919, the petitioner owned 4,400 shares of the common stock of the Manufacturing Company, but at no time owned any part of the preferred stock.

In the year 1919, the Manufacturing Company owned 5,541 shares of the stock of the petitioner.

In 1919, the petitioner reduced its capital stock *without consideration* to 2,500 shares of common stock and 2,500 shares of preferred stock; all of the par value of \$100.00 each. This procedure reduced the 5,541 shares of the petitioner's stock then owned by the Manufacturing Company to $1385\frac{1}{4}$ shares of common and $1385\frac{1}{4}$ shares of preferred. In the distribution of its reduced stock, the petitioner issued $1385\frac{1}{4}$ shares of preferred stock to certain owners of the preferred stock of the Manufacturing Company; $629\frac{1}{4}$ shares of common stock to other stockholders of the Manufacturing Company; $1,114\frac{3}{4}$ shares of preferred stock, and $1,114\frac{3}{4}$ shares of common stock to its stockholders other than the Manufacturing Company; and retained unissued 756 shares of common stock.

Summarizing the issuance of said stock we have:

PREFERRED STOCK OF WALVILLE
LUMBER COMPANY
AFTER RECAPITALIZATION

1,385 $\frac{1}{4}$ shares of preferred stock issued to
owners of preferred stock of WAL-
WORTH & NEVILLE MANU-
FACTURING COMPANY.

1,114 $\frac{3}{4}$ shares of preferred stock issued to
stockholders of WALVILLE LUM-
BER COMPANY other than the
WALWORTH & NEVILLE MAN-
UFACTURING COMPANY.

TOTAL 2,500 shares of preferred stock being en-
tire issue of WALVILLE LUM-
BER COMPANY preferred stock
after recapitalization.

COMMON STOCK OF WALVILLE

LUMBER COMPANY

AFTER RECAPITALIZATION

629 $\frac{1}{4}$ shares issued to common stockholders of WALWORTH & NEVILLE MANUFACTURING COMPANY, other than the WALVILLE LUMBER COMPANY.

1,114 $\frac{3}{4}$ shares issued to stockholders of WALVILLE LUMBER COMPANY other than WALWORTH & NEVILLE MANUFACTURING COMPANY.

756 shares unissued and remaining with WALVILLE LUMBER COMPANY, and being the proportion which its 4,400 shares of common stock investment in WALWORTH & NEVILLE MANUFACTURING COMPANY apparently entitled it to.

TOTAL 2,500 shares of common stock being entire issue of WALVILLE LUMBER COMPANY common stock after recapitalization.

As stated above, the WALWORTH & NEVILLE MANUFACTURING COMPANY was entitled, after recapitalization, to $1,385\frac{1}{4}$ shares of common and $1,385\frac{1}{4}$ shares of preferred of WALVILLE LUMBER COMPANY stock. Instead of receiving direct the $1,385\frac{1}{4}$ shares of preferred stock, the same was issued to the preferred stockholders of the Manufacturing Company, so that portion of the Lumber Company's obligation was discharged.

As regards the $1,385\frac{1}{4}$ shares of common stock to which the Manufacturing Company was entitled, this obligation was discharged in the following manner:

$629\frac{1}{4}$ shares of common issued to stockholders of WALWORTH & NEVILLE MANUFACTURING COMPANY other than the WALVILLE LUMBER COMPANY.

756 shares of common remaining unissued with the WALVILLE LUMBER COMPANY and being the proportion which its 4,400 shares of common stock in WALWORTH & NEVILLE MANUFACTURING COMPANY apparently entitled it to.

TOTAL $1,385\frac{1}{4}$ shares of common stock in WALVILLE LUMBER COMPANY to which WALWORTH & NEVILLE MANUFACTURING COMPANY or its stockholders were entitled to after the recapitalization.

Upon the completion of the recapitalization of the petitioner, the Manufacturing Company had no assets and was dissolved with its outstanding stock of the par value of \$440,000.00 owned by the WALVILLE LUMBER COMPANY. It was also in debt to its own preferred stockholders in amounts not disclosed by the records.

In its income and profits tax return for the year 1919, the petitioner estimated the value at March 1, 1913, of its 4,400 shares of the common stock of the Manufacturing Company at \$150,000.00 and deducted as a loss sustained in the taxable year the difference between such value and the par value of its 756 shares of unissued stock, or a loss in the amount of \$74,400.00. The respondent disallowed the deduction so claimed and determined the deficiency here in controversy.

The parties agree that the stock of the WALWORTH & NEVILLE MANUFACTURING COMPANY owned by the petitioner were acquired at a cost of \$440,000.00 and had a fair market value of \$225,967.28 at March 1, 1913, and that the 756 shares of the unissued stock of the petitioner in the taxable year 1919 had a fair market value of \$107,197.53. Therefore, if the Court should decide that the petitioner is entitled to deduct the loss claimed, the amount of such deduction is \$118,769.75.

The testimony at the hearing conclusively showed that the 756 shares of stock of the WALVILLE LUMBER COMPANY which remained unissued after the reduction of the capital stock of the WALVILLE LUMBER COMPANY, was the proportionate amount of WALVILLE LUMBER COMPANY stock which its holdings in the WALWORTH & NEVILLE MANUFACTURING COMPANY would have entitled it to receive on the distribution of the assets of the latter company if the said 756 shares of common stock had actually been issued, and a dissolution had at that time. (Testimony of JOHN H. NEVILLE, both direct and cross-examination hereinafter quoted and referred to.)

The Board rendered its Findings of Fact, together with an opinion on May 28, 1928, in which the Board held that the petitioner sustained no deductible loss in the year 1919 with respect to its investment in the 4,400 shares of stock of the WALWORTH & NEVILLE MANUFACTURING COMPANY.

Thereafter on May 31, 1928, the Board entered its final Order of Redetermination ordering and deciding that there was a deficiency in tax for the year 1919 in the sum of \$7,514.86.

Thereafter, the petitioner feeling itself aggrieved by the Findings of Fact, opinion, decision

and Order of Redetermination presented its Petition for Review before this Court.

ASSIGNMENTS OF ERROR SEPARATELY
STATED AND NUMBERED IN RESPECT
OF EACH AND EVERY ERROR ASSERTED
AND INTENDED TO BE ARGUED

The decision, order and judgment made and entered by the United States Board of Tax Appeals in the above entitled cause on May 31, 1928, in favor of the respondent, Commissioner of Internal Revenue, and against the petitioner, WALVILLE LUMBER COMPANY, is erroneous and against the just rights of the said petitioner, and as a basis for review of said decision, order and judgment, petitioner makes the following assignments of error which said petitioner avers occurred upon the hearing of said cause and upon which assignments of error the petitioner relies as a basis of this proceeding:

I.

The Board erred in entering the Order of Redetermination made and entered on May 31, 1928, and in finding and deciding that there is a deficiency for the year 1919 in the amount of \$7,514.86 or in any amount.

II.

The Board erred in finding as a fact that upon the completion of the recapitalization of the pe-

tioner, WALVILLE LUMBER COMPANY, the WALWORTH & NEVILLE MANUFACTURING COMPANY had as assets an interest in the stock of the petitioner, there being no evidence in the record to support any such finding and there being no competent evidence offered or received at the hearing to prove the allegations of said finding of fact and said allegations of said finding of fact were and are against the preponderance of the evidence.

III.

The Board erred in its conclusion in its decision and opinion promulgated under date of May 28, 1928, to the effect that if the petitioner had issued to the WALWORTH & NEVILLE MANUFACTURING COMPANY the $1,385\frac{1}{4}$ shares of preferred stock and the $1,385\frac{1}{4}$ shares of common stock of the petitioner to which the Manufacturing Company was entitled, and if, after such issue, the WALWORTH & NEVILLE MANUFACTURING COMPANY had distributed such issue as a liquidating dividend, the petitioner, as the owner of 4,400 of the 9,000 outstanding shares of stock of the WALWORTH & NEVILLE MANUFACTURING COMPANY would have received back $1,354\frac{1}{4}$ shares of its own stock and other owners of the stock of the WALWORTH & NEVILLE MANUFACTURING COMPANY would have received the remainder or 1,416 shares, there being no evidence

in the record to support any such finding and there being no competent evidence offered or received at the hearing to prove the allegations of said finding of fact and conclusion and said allegations of said finding of fact and conclusion were and are against the preponderance of the evidence and the said conclusion and the whole thereof is not supported by the findings of fact or the evidence herein.

IV.

The Board erred in failing and refusing to find and adopt petitioner's requested finding of fact Number One.

V.

The Board erred in failing and refusing to find and adopt petitioner's requested finding of fact Number Two.

VI.

The Board erred in failing and refusing to find and adopt petitioner's requested finding of fact Number Five.

VII.

The Board erred in failing and refusing to find and adopt petitioner's requested finding of fact Number Six.

VIII.

The Board erred in its conclusion that the petitioner sustained no loss in the year 1919 with respect to its investment in the 4,400 shares of stock of the WALWORTH & NEVILLE MANUFACTURING COMPANY which were purchased and paid for by the petitioner in 1908 and which had become worthless within the year 1919.

IX.

The Board erred in entering the Order of Re-determination made and entered on May 31, 1928, for the reason that the same is not supported by the findings of fact herein nor by any evidence herein.

X.

The Board erred in failing and refusing to enter an order in favor of the petitioner ordering and deciding that there was and is no deficiency in income and profits taxes for the year 1919.

THE ISSUE

The only question is whether the petitioner, WALVILLE LUMBER COMPANY, sustained a deductible loss in the year 1919 with respect to its investment in the 4,400 shares of stock of the WALWORTH & NEVILLE MANUFACTURING COMPANY which was dissolved during such year. The petitioner claims a deductible loss measured by

the difference between the fair market value of the 4,400 shares as of March 1, 1913, in the sum of \$225,967.28 and the value of its 756 unissued shares in 1919 in the sum of \$107,197.53, or a loss of \$118,769.75.

ARGUMENT

POINT I. At the very most, petitioner received as a liquidating dividend on its 4,400 share investment in the WALWORTH & NEVILLE MANUFACTURING COMPANY, the sum of \$107,197.53, which represents the admitted value of its 756 unissued shares, which was its *pro rata* allowance on its 4,400 share investment in the WALWORTH & NEVILLE MANUFACTURING COMPANY and using as a basis the admitted fair market value thereof of \$225,967.28 as of March 1, 1913, the petitioner sustained a deductible loss in 1919 in the sum of \$118,769.75.

POINT II. The petitioner did not buy or sell its own capital stock, so as to come within the "capital transaction" rule hereinafter referred to.

These points being closely related, will be considered together.

That the 4,400 shares of stock of the WALWORTH & NEVILLE MANUFACTURING COMPANY, hereinafter sometimes also referred to as the "Manufacturing Company," were acquired prior to March 1, 1913, at a cost of \$440,000.00, and had a fair market value at the basic date mentioned

of \$225,967.28, is admitted by the respondent, as is the fact also that the Manufacturing Company was dissolved during the taxable year 1919. The record discloses that the authorized and outstanding capital stock of the petitioner was reduced in the year 1919 *without consideration* from \$1,000,000.00 to \$500,000.00, consisting in equal amounts of common and preferred stock and that all of the preferred stock was issued, and only 1,744 shares of the common was issued, thus leaving 756 shares of the common of the par value of \$75,600.00 at all times unissued.

At the very outset, we might point out that the respondent will undoubtedly contend that the transaction, which took place in 1919, was what the Treasury Department terms "a capital transaction"—that is, either the purchase or sale by a corporation of its own capital stock. The Treasury Department has by regulation provided that a corporation realizes no gain or loss from the purchase or sale of its own stock. We are not here concerned as to whether or not the said regulation is valid.

We might point out to the Court that the respondent, Commissioner of Internal Revenue, has apparently not questioned the fact that the petitioner sustained a loss in the year 1919 with respect to its 4,400 share investment in the common stock of the WALWORTH & NEVILLE MANUFACTURING COMPANY, but apparently has con-

tended that said loss is not deductible on the theory that the same was a "capital transaction." This is the only ground upon which the Commissioner disallowed the loss. The denial by the Commissioner of petitioner's claim in abatement from which the appeal in this case was taken to the United States Board of Tax Appeals, states under "Explanation of Adjustments to Net Income" for the year 1919, in Paragraph (b) thereof, the following:

"Loss claimed on WALWORTH & NEVILLE MANUFACTURING COMPANY stock is not allowed as a deduction from income since same is considered a capital account. (See Article 862, Regulations 45. Office decision 479; Cumulative Bulletin III-2.)" (Transcript of record, p. 17.)

As an addition to net income as a part of said statement appears under (b) "Losses on W. & N. Mfg. Co., \$74,400.00." (Transcript of Record, p. 15.)

It will thus be seen that the Commissioner's only ground for disallowing the loss claimed in the income tax return, was that the same constituted a "capital transaction." *Article 862 of Regulations 45*, reads as follows:

"Where a corporation either directly or indirectly, as for example through a trustee, has prior to the taxable year bought its own stock, either for the purpose of retirement or of holding it in the treasury or for other pur-

poses, the entire cost of such stock must be deducted from the aggregate invested capital as of the beginning of the taxable year, if such deduction has not already been made. Where such stock is purchased during the taxable year, a deduction from the invested capital as of the beginning of the taxable year and effective from the date of such purchase is required only to the extent that such stock has not been purchased out of the undivided profits of the taxable year. The full amount derived in cash or its equivalent from the resale of such stock may be included in the invested capital from the date of such resale, unless such stock had been purchased out of earnings of the taxable year."

Office decision 479 upon which the Commissioner based his ruling that the instant case was a capital transaction, appears in Cumulative Bulletin No. 2, Jan.-June 1920, Income Tax Rulings of the Treasury Department, Bureau of Internal Revenue, at page 29, thereof, and reads in full as follows:

"A corporation issued additional shares of stock equal to approximately 7 per cent of the amount previously outstanding, using the proceeds from the sale of the stock to purchase an additional plant which, however, was later abandoned as a manufacturing plant and sold. The proceeds of this sale were used to purchase equipment for carrying out Government contracts during the war. Upon the completion of the contracts the corporation had more funds than were needed in its business and retired approximately twice the amount of additional stock previously issued, paying for each share an amount in excess of its par value. The

amount representing the par value of the stock was charged to capital account, and the amount paid in excess of its par value was charged to surplus accumulated prior to March 1, 1913. After the distribution, the corporation had no greater surplus than was reasonably required for the needs of its business.

“Held, that the distribution was not a dividend within the meaning of Section 201 (a) and (b) of the Revenue Act of 1918, but was a distribution in part liquidation of the corporation within the meaning of Section 201 (c) of the Act.

“The transaction should be treated as a *voluntary purchase* by the corporation of its capital stock for the purpose of its retirement, and the entire cost of such stock is a required deduction from invested capital of the company as of the beginning of the taxable year and effective from the date of purchase only to the extent that such stock has not been purchased out of the *undivided profits* of the taxable year.

“The stockholders who sold their stock to the company should return as income, subject to both the normal and additional taxes, any excess over and above the cost of the stock to them, or its fair market value as of March 1, 1913, if acquired prior thereto.”

This same argument was urged by the respondent before the Board of Tax Appeals. The respondent's answer before the Board set up the following so-called “Propositions of Law” which respondent contended to be the law. (Transcript of Record, p. 27.)

“(1) Where a corporation exchanged shares of its own stock for shares of stock in another corporation and later upon liquidation of the other corporation received back a portion of its shares of stock, the resulting loss on the transaction is not deductible from the taxpayer's gross income but affects only its invested capital.

“(2) Where a corporation buys its own stock the entire cost of such stock must be deducted from its invested capital.”

However, upon reading the Board's decision, one can find no mention of this theory. On the contrary, the Board proceeded on assumptions as to matters not in the record (and in fact the assumptions are contrary to the record) and disposed of the case on these assumptions.

The Board in deciding the case said—(Transcript of Record, pages 34 and 35):

“After reorganization the petitioner's stock consisted of 2,500 shares of preferred and 2,500 shares of common, of which $1,385\frac{1}{4}$ shares of preferred and an equal number of shares of common should have been issued to the manufacturing company, which was the owner of 55.41 per cent of the petitioner's original 10,000 shares of issued capital stock. If, after such issue, the manufacturing company had distributed the stock so received as a liquidating dividend, the petitioner, as the owner of 4,400 of the 9,000 outstanding shares of stock of the manufacturing company, would have received back $1,354\frac{1}{4}$ shares of its own stock, and other owners of the stock of the manufacturing com-

pany would have received the remainder, or 1,416 shares. Probably on account of its obligations to its preferred stockholders the manufacturing company distributed, or consented to distribution directly to its stockholders, 1,385 $\frac{1}{4}$ shares of the preferred and 629 $\frac{1}{4}$ shares of the common stock, which were due it from the petitioner after reorganization. The effect of this procedure was that the petitioner received no part of the 1,354 shares of its stock due as a liquidating dividend from the manufacturing company and received no advantage therefrom measurable in stock other than the retention of 756 shares of its new common stock unissued.

“Since each of the two companies here involved owned a controlling interest in the common stock of the other when the procedure above described was decided upon, we may assume that all the steps taken were the acts of the two corporations with the knowledge and consent of the stockholders of each. Obviously the petitioner must have agreed to relinquish a part of the liquidating dividend due it upon the dissolution of the manufacturing company in favor of the preferred stockholders of that concern. Whether the extra stock received by such preferred stockholders was a gift to them, a liquidating dividend from the manufacturing company, or a stock dividend distributed by the petitioner, cannot be determined from the meager record before us and in our opinion is not material. In any event, the petitioner has proved no loss deductible from its income in the taxable year for tax purposes.”

It will thus be seen that the Board lavishly indulged in the assumption that if the WALWORTH & NEVILLE MANUFACTURING COMPANY

had received its proportion of WALVILLE LUMBER COMPANY stock upon the recapitalization in 1919, and if thereafter the WALWORTH & NEVILLE MANUFACTURING COMPANY had distributed the stock so received as a liquidating dividend, the WALVILLE LUMBER COMPANY would have received $1,354\frac{1}{4}$ shares of its own stock instead of the 756 shares which had remained unissued.

In indulging in this assumption the Board entirely overlooked the evidence in the case. JOHN H. NEVILLE, the President and General Manager of the WALVILLE LUMBER COMPANY, testified on direct examination as follows:

“The 756 shares of common stock which were never issued by the WALVILLE LUMBER COMPANY, was the amount of stock which the WALVILLE LUMBER COMPANY would have received if it had issued to the WALWORTH & NEVILLE MANUFACTURING COMPANY all of the stock that was due that company and then a liquidation of that company had taken place. In other words the 756 shares of the WALVILLE LUMBER COMPANY stock, which were never issued, after the reduction of the capital stock of the WALVILLE LUMBER COMPANY, was the proportionate amount of the WALVILLE LUMBER COMPANY’S stock which its holdings in the WALWORTH & NEVILLE MANUFACTURING COMPANY would have entitled it to receive on the disposition of the assets of that corporation.” (Transcript of Record, page 66.)

On cross examination he testified as follows:

“The 756 shares of the common stock of the WALVILLE LUMBER COMPANY, which were not issued in 1919, represented the Lumber Company’s proportion of the assets of the WALWORTH & NEVILLE MANUFACTURING COMPANY on dissolution. The reason why it was not issued was that it seemed like the better thing for the WALVILLE LUMBER COMPANY to do, to have the 756 shares as unissued stock rather than treasury stock. There was no point in issuing the stock and it gave the Lumber Company the advantage of keeping it as unissued stock.” (Transcript of Record, pages 67 and 68.)

The respondent evidently was satisfied with this evidence and with this explanation for he proceeded no further with his cross examination along this line and apparently was content to agree with the petitioner that the WALVILLE LUMBER COMPANY had received all that it was entitled to receive, if a formal dissolution and liquidation of the WALWORTH & NEVILLE MANUFACTURING COMPANY had taken place at the time of the recapitalization of the WALVILLE LUMBER COMPANY.

The above is the only evidence in this case on the point, which point the Board saw fit to assume contrary to the evidence and we submit the fact is that the 756 shares of the WALVILLE LUMBER COMPANY stock which remained unissued in 1919 was the exact proportion of the liquidating dividend

in the WALWORTH & NEVILLE MANUFACTURING COMPANY which the WALVILLE LUMBER COMPANY was entitled to receive, and that said unissued 756 shares was the full amount that the Lumber Company received on account of its 4,400 share investment in the WALWORTH & NEVILLE MANUFACTURING COMPANY.

We desire the Court to bear in mind that the WALVILLE LUMBER COMPANY is not claiming a loss on either the sale or purchase of its own capital stock, but is claiming a loss on its investment in 4,400 shares of stock in the WALWORTH & NEVILLE MANUFACTURING COMPANY. Therefore, the "capital transaction" rule of the Treasury Department, even though valid, does not apply to this case.

In the instant case, there was no sale or exchange of petitioner's stock. On the contrary the petitioner acquired the unissued 756 shares of its own capital stock by operation of law upon the dissolution and liquidation of the WALWORTH & NEVILLE MANUFACTURING COMPANY in which the petitioner owned 4,400 shares, which petitioner acquired at a cost of \$440,000.00, and which, as admitted, had a fair market value on the basic date of Marh 1, 1919, of \$225,967.28.

The petitioner claims the right to deduct as a loss for the year 1919 its loss on its investment in

the 4,400' shares of stock in the WALWORTH & NEVILLE MANUFACTURING COMPANY under the provisions of paragraph (4), of Subdivision (a) of Section 234 of the Revenue Act of 1918, which provides that in computing the net income of a corporation, there shall be allowed,

“Losses sustained during the taxable year and not compensated for by insurance or otherwise.”

The instant case is analogous to the case of *Behlow Estate Co. vs. Commissioner of Internal Revenue*, decided by the United States Board of Tax Appeals on July 16th, 1928, and reported in 12 B. T. A. 1365 and upon which case the petitioner strenuously relies. In that case it appeared that H. F. Behlow offered to sell his 1,015.7 shares of the capital stock of the Behlow Estate Company for the cancellation of all indebtedness due by him to the corporation and the payment of \$60,000.00, which amount was subsequently changed to \$63,500.00. The corporation did not have sufficient assets on hand and an arrangement was made whereby Behlow's offer was accepted by the corporation and the corporation agreed to pay him for his shares of stock, certain stocks and bonds in other corporations that it had acquired at a total cost of \$42,100.50. There was also paid to him the sum of \$10,000.00 in cash and he was given a promissory note of the corporation for the balance due. In the adjustment that was made by the corporation with Behlow, the stocks

and bonds that had been acquired at a total cost of \$42,100.50 were turned over to Behlow at an agreed value of \$32,211.00. The difference of \$9,889.50, being the difference between the cost of the stocks and bonds to the corporation and the valuation placed thereon at the time they were turned over to Behlow, was claimed by the corporation as a loss resulting from the sale. The Commissioner of Internal Revenue disallowed the loss on the theory that this was a purchase by the corporation of its own shares of stock and so was a "capital transaction," from which neither gain nor loss could result. The Board, however, overruled the Commissioner and held in favor of the corporation, allowing the corporation to deduct the loss claimed. The Board, in a very clear decision, stated:

"A stockholder of petitioner was desirous of selling his capital stock and petitioner, after consideration, decided to purchase the same upon the terms and conditions set forth in the findings of fact. The petitioner was to cancel the indebtedness of the seller, transfer to him certain stocks and bonds owned by it, pay \$10,000.00 in cash, and give a promissory note for the balance due. The stock and bonds that figured in the transaction had been purchased by petitioner subsequent to March 1, 1913, at a cost of \$42,100.50, and were sold to H. F. Behlow for a consideration of \$32,211.00. The difference of \$9,889.50 the petitioner seeks to deduct as a loss, resulting from the sale.

"Counsel for respondent contends that this case is governed by the proposition that a cor-

poration can realize neither gain nor loss in the purchase of its own capital stock and relies in support thereof on the decision in the appeals of *Simmons & Hammond Manufacturing Co.*, 1 B. T. A. 803; *Farmers & Merchants State Bank*, 2 B. T. A. 130; *Farmers Deposit National Bank*, 5 B. T. A. 520; *H. S. Crocker Co.*, 5 B. T. A. 537; and A. R. R. 693, Cumulative Bulletin No. 5, p. 207.

“The cases relied upon are not authority for the position taken. This is not a case of a gain or loss realized or sustained by a corporation in the purchase of its own capital stock or gain or loss resulting from the purchase by or within an affiliated group of corporations. Petitioner seeks to take a loss represented by the difference between the cost of the stocks and bonds in question and the sale price thereof. The stock of petitioner is not in question nor a gain or loss resulting from the purchase thereof. In the appeal of *Simmons & Hammond Manufacturing Co.*, *supra*, the petitioner had purchased its own capital stock and endeavored to take a loss on the subsequent sale of the same. We held that to be a capital transaction that did not result in a realized loss. Here the petitioner is not seeking such a loss but rather one that resulted from the sale to Behlow of stocks and bonds of other corporations for less than cost. The fact that the stocks and bonds were to be applied to the extent of their then value in payment of the purchase price of its own stock, does not make the same a capital transaction from which neither gain nor loss may result. Cf. *Callanan Road Improvement Co.*, 12 B. T. A. 1109.

“The good faith of the transaction is not involved, nor do we have the question of a

transaction having to do with a partial or complete liquidation or dissolution. What we would do if such questions were involved need not be here decided.

“Petitioner is entitled to the loss as claimed.”

An interesting case on this same general proposition is that of *Callanan Road Improvement Company vs. Commissioner of Internal Revenue*, decided by the United States Board of Tax Appeals on July 3, 1928, and reported in *12 B. T. A. 1109*. In that case a dividend of \$12,000.00 was declared by the petitioner corporation. The corporation owned in its own right, Liberty Bonds of the par value of \$12,000.00. The Liberty Bonds were appraised at their market value and were delivered to the stockholders at the appraised market value in part payment of the cash dividend declared, and the remainder of the cash dividend was paid by cash from the treasury of the corporation. The bonds were originally purchased by the corporation for the sum of \$12,000.00 and had a fair market value at date of payment to the stockholders of \$10,636.80. The corporation deducted the difference of \$1,363.20 as a loss for the year. The Commissioner disallowed the deduction. In holding the Commissioner to be in error and giving the taxpayer the right to deduct the loss claimed, the Board said:

“Does a corporation sustain a loss upon the payment of a dividend in property which

cost it more than the value at the time of payment to the stockholders? If the corporation had sold the bonds in question at the market price on February 14, 1921, there would be no question as to the deductibility of the loss. Instead of selling the bonds, however, it discharged an obligation of \$10,636.80 with bonds of that market value. That there was a legal obligation as soon as the dividend was declared out of surplus see paragraph 3653, *Fletcher Cyclopedia of Corporations* and cases cited; also *W. E. Caldwell & Co., Inc.*, 6 B. T. A. 47. The situation is not governed by the principles involved in those cases in which we have decided, as in *Independent Brewing Co. of Pittsburgh*, 4 B. T. A. 870, that a corporation does not realize taxable income or a loss from the purchase or sale of its own bonds. Here we have a realization of the loss through complete disposition of certain assets of the corporation. The position of the stockholders as to whose stock dividend is voted is no different from that of general creditors. When the dividend of \$12,000.00 was declared, the corporation could not satisfy the legal demands of the stockholders by the delivery to them of \$10,636.80 worth of Liberty Bonds. The corporation thus parted with assets which cost it \$12,000.00 and discharged its obligation for \$10,636.80. We do not believe that *Bowers vs. Kerbaugh-Empire Co.*, 271 U. S. 170, announces a rule of law that is inconsistent with our holding, as we do, that a loss was sustained. That decision holds that no income resulted on discharge of indebtedness in a case where the entire transaction resulted in a loss. In this proceeding the loss was no less real because the disposition was made to stockholders."

The Board found and it was admitted by both parties that the unissued 756 shares of stock of the petitioner corporation in the taxable year in question had a fair market value of \$107,197.53. These 756 unissued shares could just as well have been issued to the WALWORTH & NEVILLE MANUFACTURING COMPANY and by said company sold for said sum of \$107,197.53, and the said amount distributed to the WALVILLE LUMBER COMPANY as its proportion of the liquidating dividend in the Manufacturing Company. In such case it could not be denied that the petitioner would have sustained a deductible loss measured by the difference between the sum of \$225,967.28 being the March 1, 1913, value of petitioner's 4,400 share investment in the WALWORTH & NEVILLE MANUFACTURING COMPANY and the sum realized on liquidation, to-wit: \$107,197.53, or a deductible loss of \$118,769.75. What difference does it make if instead of selling the stock, it was distributed in specie to the WALVILLE LUMBER COMPANY as a liquidating dividend. This, of itself, does not turn the transaction into one where the corporation purchases or sells its own stock so as to come within the "capital transaction" rule adopted by the Treasury Department.

In this connection we would specifically call the Court's attention to the case of *New Jersey Porcelain Company vs. Commissioner of Internal Reve-*

nue, decided March 25, 1929, and reported in 15 B. T. A. 1059. The question in that case was whether the petitioner corporation sustained a deductible loss on the sale of certain assets. It appeared that the corporation had an authorized capital stock of \$125,000.00 consisting of 1,000 shares of common and 250 shares of preferred stock; each of the par value of \$100.00. One Wenczel was the owner of certain lands and buildings that he had acquired at a cost of \$14,000.00. He turned said land and buildings over to the corporation for which the corporation paid by issuing its shares of stock of the par value of \$14,000.00. Thereafter, the corporation constructed additional buildings and acquired additional property so that in the year involved, the depreciated cost of all of said property was \$47,088.35. The corporation then decided to abandon said property and offered the same for sale. Four stockholders of the said corporation decided to purchase the property and a sale of the property was made to the said four stockholders at an agreed price of \$25,000.00, payable as follows: \$1,340.00 in cash; \$13,660.00 in common and preferred stock of the corporation, which was all of the stock owned by the said four stockholders, and \$10,000.00 secured by a mortgage bond on the property. The \$13,660.00 of the corporation's stock received by the corporation as a part of the consideration of the sale, were taken into the corporation's account as treasury stock. It was proven that the market value of the

corporation's common and preferred stock at all times was One Hundred (\$100.00) Dollars per share. In its income tax return for the year in question, the corporation deducted the sum of \$22,088.35 from its gross income as a loss sustained in such year from the sale of the said assets, said figure being the difference between the depreciated cost of the property sold and the amount of the purchase price paid by the said four stockholders. Upon audit, the Commissioner of Internal Revenue disallowed the said deduction and as reason therefor stated:

“The transaction involving the sale of the old plant for shares of your capital stock is held to be a capital transaction within the meaning of Article 543 regulation 62, whereby no gain or loss can be recognized for income tax purposes.”

The Board, however, held that this did not constitute a capital transaction within the meaning of the regulations and allowed the deduction. The Board said:

“The Commissioner disallowed the loss in controversy on the theory that the inclusion of certain shares of the petitioner's outstanding capital stock in the consideration received from the purchasers converted the entire procedure of sale and purchase into a capital transaction from which neither gain nor loss could result. We think this contention is conclusively dealt with adversely to the theory of the respondent in *Behlow Estate*, 12 B. T. A. 1365. The facts in that appeal are quite similar to those proved

in the instant proceeding. The respondent there relied on our decisions in *Simmons & Hammond Manufacturing Co.*, 1 B. T. A. 803; *Farmers & Merchants State Bank*, 2 B. T. A. 130; *Farmers Deposit National Bank*, 5 B. T. A.; and *H. S. Crocker Co.*, 5 B. T. A. 537. In the *Behlow* decision we said:

“The cases relied upon are not authority for the position taken. This is not a case of a gain or loss realized or sustained by a corporation in the purchase of its own capital stock or gain or loss resulting from the purchase by or within an affiliated group of corporations. Petitioner seeks to take a loss represented by the difference between the cost of the stocks and bonds in question and the sale price thereof. The stock of petitioner is not in question nor a gain or loss resulting from the purchase thereof. In the appeal of *Simmons & Hammond Manufacturing Co.*, *supra*, the petitioner had purchased its own capital stock and endeavored to take a loss on the subsequent sale of the same. We held that to be a capital transaction that did not result in a realized loss. Here the petitioner is not seeking such a loss but rather one that resulted from the sale to Behlow of stocks and bonds of other corporations for less than cost. The fact that the stocks and bonds were to be applied to the extent of their then value in payment of the purchase price of its own stock does not make the same a capital transaction from which neither gain nor loss may result. *Cf. Callanan Road Improvement Co.*, 12 B. T. A. 1109.

“In the case of *United States vs. Cedarburg Milk Co.*, 288 Fed. 996, the controversy hinged on facts almost identical to those herein, with the position of the parties reversed. There

the taxpayers sought to escape payment on the gain resulting from the sale of capital assets in which a part of the consideration was shares of its own capital stock. The Government opposed this contention. The court held for the Government. The substance of that decision is thus stated in the *syllabus*:

“ ‘Where facts showed that corporation, on a sale or other disposition of the property, made a gain, the taxability of such gain was not to be avoided on the theory that its property became merged with the property of another corporation, and it was immaterial that part of the consideration was in corporate stock of the vendee, and that under state law no right existed to stipulate for part of the consideration in corporate stock.’

“In conformity with our own decision in the *Behlow* proceeding, *supra*, and with the opinion of the court in *United States vs. Cedarburg Milk Co.*, *supra*, we conclude that the transaction here involved is not to be regarded as the purchase by the petitioner of its own stock or the liquidation of such stock, but as a sale of capital assets. This being true, the purchase price must be ascertained by including therein the fair market value of the property other than cash and mortgages which was received. As we have found that the fair market price of petitioner's stock at date of sale was \$100 per share, it follows that the alleged loss has been proved unless other facts of record yet to be considered bar this conclusion.”

CONCLUSION

The evidence shows by overwhelming weight:

First, that the 4,400 share investment of the WALVILLE LUMBER COMPANY in the common stock of the WALWORTH & NEVILLE MANUFACTURING COMPANY was acquired in the year 1908 at a cost of \$440,000.00 and had an admitted fair market value at the basic date of March 1, 1913, of \$225,967.28.

Second, that the WALWORTH & NEVILLE MANUFACTURING COMPANY was dissolved in the year 1919 and that the WALVILLE LUMBER COMPANY received as its proportion of the liquidating dividend 756 unissued shares of its own common stock and received no more.

Third, that the 756 unissued shares of its own common stock which the WALVILLE LUMBER COMPANY received on liquidation of the WALWORTH & NEVILLE MANUFACTURING COMPANY had an admitted fair market value of \$107,197.53.

Fourth, that the said 756 unissued shares of its own common stock received by the WALVILLE LUMBER COMPANY was the full amount which the said company was entitled to receive on account of its 4,400 share investment in the common stock of the WALWORTH & NEVILLE MANUFACTURING COMPANY.

Fifth, that the WALVILLE LUMBER COMPANY sustained a deductible loss in the year 1919, of \$118,769.75 on its 4,400 share investment in the common stock of the WALWORTH & NEVILLE MANUFACTURING COMPANY, which amount is the difference between the fair market value thereof on the basic date of March 1, 1913, in the sum of \$225,967.28, and the amount of \$107,197.53, being the value of the 756 unissued shares of common stock in the WALVILLE LUMBER COMPANY received on liquidation of the Manufacturing Company in 1919.

It is submitted that the conclusion is irresistible that the Order of Redetermination of the United States Board of Tax Appeals entered on May 31, 1928, should be reversed and the cause remanded to said Board with instructions to allow the WALVILLE LUMBER COMPANY a deductible loss of \$118,769.75 in its income and profits tax return for the year 1919.

Respectfully submitted,

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WALVILLE LUMBER COMPANY.

No. 57108

**In the United States Circuit Court of
Appeals for the Ninth Circuit**

**WALVILLE LUMBER COMPANY, A CORPORATION,
PETITIONER**

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

**ON PETITION TO REVIEW AN ORDER OF THE UNITED
STATES BOARD OF TAX APPEALS**

BRIEF FOR THE RESPONDENT

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SEP 14 1929

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 5710

WALVILLE LUMBER COMPANY, A CORPORATION, PETI-
tioner

v. .

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

*ON PETITION TO REVIEW AN ORDER OF THE UNITED STATES
BOARD OF TAX APPEALS*

BRIEF FOR THE RESPONDENT

PREVIOUS OPINION

The only previous opinion in this case is that of the United States Board of Tax Appeals (R. 32-35), which is reported in 12 B. T. A. 152.

JURISDICTION

The appeal in the above-entitled cause involves income and profits taxes for the year 1919 in the amount of \$7,514.86, and is taken from a decision (order of redetermination) by the Board of Tax Appeals entered May 31, 1928. (R. 36.) The case is brought to this court by petition for review filed

November 23, 1928 (R. 44), pursuant to the provisions of the Revenue Act of 1926, c. 27, Sections 1001, 1002, 1003, 44 Stat. 9, 109, 110.

QUESTION PRESENTED

In the year 1908 the taxpayer corporation was organized, and with its stock purchased all of the assets of the Walworthy & Neville Manufacturing Company, together with 4,400 shares of the stock of the manufacturing company, the latter costing (March 1, 1913, value) \$225,967.28, which gave taxpayer control of the manufacturing company. In 1919 taxpayer reduced its capital stock from 10,000 shares to 5,000 shares. At the time of this reorganization the manufacturing company owned 5,541 shares, or 55.41%, of the stock of taxpayer, and, in accordance with the said reorganization of taxpayer, the manufacturing company became entitled to receive 2,770½ shares of taxpayer's stock. In order to effect a liquidation of the manufacturing company, in 1919 taxpayer, instead of issuing to the manufacturing company the stock of taxpayer which the manufacturing company owned and was entitled to receive, pursuant to taxpayer's reorganization, issued all of said stock to stockholders of the manufacturing company except 756 shares, which remained unissued and which had a value of \$107,197.53.

The sole question involved is whether taxpayer is entitled to claim as a loss for the year 1919 the difference between the cost to it of the stock of the

manufacturing company which it purchased in 1908 and the value of the 756 shares of its stock which remained unissued at the time of the dissolution of the manufacturing company.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Revenue Act of 1918, c. 18, 40 Stat. 1057, are as follows:

SEC. 234. (a) That in computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions:

* * * *

(4) Losses sustained during the taxable year and not compensated for by insurance or otherwise;

SEC. 201. * * *

(c) A dividend paid in stock of the corporation shall be considered income to the amount of the earnings or profits distributed. Amounts distributed in the liquidation of a corporation shall be treated as payments in exchange for stock or shares, and any gain or profit realized thereby shall be taxed to the distributee as other gains or profits.

SEC. 202. (a) That for the purpose of ascertaining the gain derived or loss sustained from the sale or other disposition of property—real, personal, or mixed—the basis shall be—

(1) In the case of property acquired before March 1, 1913, the fair market price or value of such property as of that date; and

(2) In the case of property acquired on or after that date, the cost thereof; or the inventory value, if the inventory is made in accordance with section 203.

(b) When property is exchanged for other property, the property received in exchange shall for the purpose of determining gain or loss be treated as the equivalent of cash to the amount of its fair market value, if any; but when in connection with the reorganization, merger, or consolidation of a corporation a person receives in place of stock or securities owned by him new stock or securities of no greater aggregate par or face value, no gain or loss shall be deemed to occur from the exchange, and the new stock or securities received shall be treated as taking the place of the stock, securities, or property exchanged.

When in the case of any such reorganization, merger, or consolidation the aggregate par or face value of the new stock or securities received is in excess of the aggregate par or face value of the stock or securities exchanged, a like amount in par or face value of the new stock or securities received shall be treated as taking the place of the stock or securities exchanged, and the amount of the excess in par or face value shall be treated as a gain to the extent that the fair market value of the new stock or securities is greater than the cost (or if acquired prior to March 1, 1913, the fair market value as of that date) of the stock or securities exchanged.

Treasury Regulations 45 (1920 Edition) :

ART. 862. *Purchase of stock.*—Where a corporation either directly or indirectly, as for example through a trustee, has prior to the taxable year bought its own stock, either for the purpose of retirement or of holding it in the treasury or for other purposes, the entire cost of such stock must be deducted from the aggregate invested capital as of the beginning of the taxable year, if such deduction has not already been made. Where such stock is purchased during the taxable year a deduction from the invested capital as of the beginning of the taxable year and effective from the date of such purchase is required only to the extent that such stock has not been purchased out of the undivided profits of the taxable year. See article 857. The full amount derived in cash or its equivalent from the resale of such stock may be included in the invested capital from the date of such resale, unless such stock had been purchased out of earnings of the taxable year. See article 542.

ART. 1548. *Distribution in liquidation.*—So-called liquidation or dissolution dividends are not dividends within the meaning of the statute, and amounts so distributed, whether or not including any surplus earned since February, 28, 1913, are to be regarded as payments for the stock of the dissolved corporation. Any excess so received over the cost of his stock to the stockholder, or over its fair market value as of March 1, 1913, if ac-

quired prior thereto, is a taxable profit. A distribution in liquidation of the assets and business of a corporation, which is a return to the stockholder of the value of his stock upon a surrender of his interest in the corporation, is distinguishable from a dividend paid by a going corporation out of current earnings or accumulated surplus when declared by the directors in their discretion, which is in the nature of a recurrent return upon the stock.

STATEMENT OF FACTS

The petitioner was incorporated in 1908 under the laws of the State of Washington, with authorized capital stock of \$1,000,000, divided into 10,000 shares of the par value of \$100 each. In the same year it acquired from the Walworth & Neville Manufacturing Company, a Michigan corporation, certain timberlands, cut-over lands, sawmill, cross-arm factory, machinery, and equipment, and 4,400 shares of the stock of the Walworth & Neville Manufacturing Company, and issued therefor its entire authorized capital stock to persons not disclosed by the record. The value of this property at date of acquisition by the petitioner was \$1,170,000. (R. 29-30.)

The 4,400 shares of stock acquired from the Walworth & Neville Manufacturing Company, as above set forth, and owned by the petitioner at March 1, 1913, had a fair market value of \$225,967.28 on that date. In the taxable year the Walworth &

Neville Manufacturing Company owned 5,541 shares of the stock of the petitioner. (R. 30.)

In 1919 the petitioner reduced its capital stock without consideration to 2,500 shares of common stock and 2,500 shares of preferred stock, all of the par value of \$100 each. This procedure reduced the 5,541 shares of the petitioner's stock then owned by the Walworth & Neville Manufacturing Company to 1,385 $\frac{1}{4}$ shares of common and 1,385 $\frac{1}{4}$ shares of preferred. In the distribution of its reduced stock the petitioner issued 1,385 $\frac{1}{4}$ shares of preferred to certain owners of the preferred stock of the Walworth & Neville Manufacturing Company, 629 $\frac{1}{4}$ shares of common to other stockholders of such company, 1,114 $\frac{3}{4}$ shares of preferred and 1,114 $\frac{3}{4}$ shares of common to its other shareholders, and retained unissued 756 shares of common stock. (R. 30-31.)

At the request of the Walworth & Neville Manufacturing Company, the preferred stock and the common stock which it had coming to it from petitioner were issued directly to the stockholders of the Walworth & Neville Manufacturing Company, In addition thereto, the 756 shares of common stock which were never issued by petitioner represented stock which petitioner would have received if it had issued to the Walworth & Neville Manufacturing Company all of the stock that was due that company when a liquidation of that company had taken place. (R. 7, 66.)

Upon the completion of the reorganization of the petitioner the Walworth & Neville Manufacturing Company had no assets, except its interest in the stock of the petitioner, and was dissolved with its outstanding stock of the par value of \$440,000 owned by the petitioner. It was also in debt to its own preferred stockholders in amounts not disclosed by the record.

In its income and profits tax return for the year 1919 the petitioner estimated the value at March 1, 1913, of its 4,400 shares of the stock of the Walworth & Neville Manufacturing Company at \$150,000, and deducted as a loss sustained in the taxable year the difference between such value and the par value of its 756 shares of unissued stock in the amount of \$74,400. The respondent disallowed the deduction so claimed and determined the deficiency here in controversy. The parties agree that the stock of the Walworth & Neville Manufacturing Company owned by the petitioner had a fair market value of \$225,967.28 at March 1, 1913, and that the unissued stock of the petitioner in the taxable year had a fair market value of \$107,197.53, and that the Walworth & Neville Manufacturing Company owned, 5,541 shares of the common stock of the petitioner just prior to the reorganization thereof. (R. 31.)

The stock of the Walworth & Neville Manufacturing Company consisted of 8,000 shares of common and 1,000 shares of preferred. At the date of

the reorganization of the transactions involved in this proceeding the petitioner owned 44/80th of the common stock of the Walworth & Neville Manufacturing Company and the Walworth & Neville Manufacturing Company owned 55.41 per cent of the stock of the petitioner. (R. 31-32.)

SUMMARY OF ARGUMENT

The facts in the case show that petitioner, through a mutual arrangement entered into with the Walworth & Neville Manufacturing Company, voluntarily acquiesced in the surrender of assets which it was entitled to receive upon the dissolution of the manufacturing company in the year 1919. Under such circumstances petitioner can not claim a deductible loss for the year 1919 of the difference between the cost of its investment in the manufacturing company and the value of the assets which it actually received from the manufacturing company upon its liquidation, since, if the petitioner had received the assets to which it was entitled, no loss would have occurred.

Furthermore, the effect of the transaction involved was the purchase by the petitioner of its own stock, from which no deductible loss could arise. Article 862, Treasury Regulations 45; *Appeal of Simmons & Hammond Manufacturing Company*, 1 B. T. A. 803.

ARGUMENT

I

The facts as established by the record support the decision of the Board of Tax Appeals and do not support the theory advanced by petitioner

Petitioner's investment in the stock of the Walworth & Neville Manufacturing Company cost (March 1, 1913, value), \$225,967.28. This investment was extinguished in the year 1919 upon the dissolution of the manufacturing company and the petitioner claims a loss of the difference between the cost of the stock of the manufacturing company and the value of the assets which it received from the manufacturing company upon its dissolution.

Petitioner claims that the only assets which it was entitled to receive, and did receive from the manufacturing company on its liquidation, was 756 shares of its own stock, of the value of \$107,197.53, and that it thus realized a deductible loss of \$118,769.75 for the year 1919.

The Board of Tax Appeals decided that had petitioner received the assets which it was entitled to receive upon the dissolution of the manufacturing company and which the petitioner could receive, and would have received had it not voluntarily agreed to accept less, no loss would have been sustained by it.

It seems clear that if in fact petitioner was entitled to receive more of the assets of the manufac-

turing company than it actually received under the circumstances of the instant case, it can not predicate a loss upon what it actually did receive. If petitioner voluntarily acquiesced in accepting a lesser amount of the assets of the manufacturing company than it was entitled to receive, and which it could undoubtedly have received upon the liquidation of the manufacturing company had it so desired and insisted, it can not claim a loss. As pointed out by the Board of Tax Appeals in its opinion, the relationship existing between the two corporations was such that the dissolution of the manufacturing company was necessarily accomplished for the mutual benefit of both corporations and with the consent and knowledge of the stockholders of each. This is apparent from the fact that the stockholders of the manufacturing company received directly from petitioner stock which the Board of Tax Appeals decided belonged to the manufacturing company rather than to such stockholders. The explanation of a transaction thus handled might lie in the fact that the stockholders of petitioner and the stockholders of the manufacturing company were identical or substantially so, but the record is silent on this question. In any event, petitioner apparently concedes that the Board's position is sound provided it is supported by the evidence in the case, but contends that the record does not support such position. On the contrary, petitioner asserts that the record establishes

conclusively that the 756 shares of unissued stock represent the entire interest of petitioner in the assets of the manufacturing company. The decision of the case in the first instance, therefore, rests upon the question whether the proof contained in the record supports the Board's contention or the theory of the petitioner.

Petitioner on its part has singled out a portion of the testimony of J. H. Neville (Petitioner's Brief, p. 21), which it is claimed established conclusively that the 756 shares of stock were all that the petitioner was entitled to receive upon the dissolution of the manufacturing company had the regular corporate formalities been carried out. Its whole case rests upon the effect to be given this testimony. Aside from the fact that neither the Board nor this court could be bound by the testimony of a witness as to what the legal rights of a stockholder are, it seems quite clear that the true meaning of the testimony of Mr. Neville, when considered as a whole, and in connection with the allegations contained in the petition filed before the Board which were admitted by the Government, has been misunderstood by petitioner.

Preceding the portion of the testimony by Mr. Neville relied upon by petitioner, we find the following (R. 66):

The Walville Lumber Company issued all of its preferred stock and all of its common stock except 756 shares, which remained un-

issued. Thereafter, the Walworth & Neville Manufacturing Company was dissolved, having no assets on hand. At the request of the Walworth & Neville Manufacturing Company the preferred stock and the common stock *which it had coming to it from the Walville Lumber Company* was issued directly to the stockholders of the Walworth & Neville Manufacturing Company. (Italics ours.)

In this testimony the witness is explaining the disposition of the stock of the petitioner which was issued. It is clearly stated that the stock which petitioner issued to the stockholders of the manufacturing company was stock which the manufacturing company had coming to it from petitioner. The testimony relied upon by petitioner relates to the unissued portion of its stock and clearly what Mr. Neville had in mind was that the 756 shares were not what petitioner would have been entitled to as a liquidating dividend in the first instance, but what would have been due it after a greater part of its share in the assets in the manufacturing company had been issued directly to stockholders of that company.

The correctness of this view is clearly demonstrated by the allegations of taxpayer's petition (R. 7), which are admitted by the respondent's answer (R. 26), and which read as follows:

5. Prior to the reduction of the capital stock of the petitioner, the Walworth &

Neville Manufacturing Company was also the owner or holder of 5,541 shares, par value \$554,100.00, of the petitioner's capital stock, scaled down to $2,770\frac{1}{2}$ shares consisting of $1,365\frac{1}{4}$ shares of common and $1,385\frac{1}{4}$ shares of preferred stock.

6. No certificate or certificates evidencing the reduced shares of stock of the petitioner were ever issued to the Walworth & Neville Manufacturing Company representing the said $2,770\frac{1}{2}$ shares, or any other number; instead, certificates for $1,385\frac{1}{4}$ shares of preferred stock and $629\frac{1}{4}$ shares of common stock were issued directly to certain stockholders of the Walworth & Neville Manufacturing Company.

7. The balance of the said $1,385\frac{1}{4}$ shares of the common stock of the petitioner referred to under (6) above, or 756 shares, were never issued.

These admitted facts show that if the manufacturing company had received the stock which it was entitled to receive from petitioner, it would have received $1,385\frac{1}{4}$ shares of common stock and an equal number of preferred stock. As pointed out by the Board in its opinion (R. 34), a distribution by the manufacturing company to its stockholders in proportion to their respective stockholdings would have given petitioner, who owned 4,400 shares of the 9,000 outstanding shares of the manufacturing company, title to $1,354\frac{1}{4}$ shares of its stock instead of to 756 shares, which it construc-

tively received. This conclusion is a matter of mathematical calculation and clearly shows that the portion of the testimony of Mr. Neville relied on by petitioner has either been misunderstood or is in error.

The Board of Tax Appeals was, therefore, clearly right in its view of the case, and this would have been true regardless of Mr. Neville's testimony, because the stock interest of petitioner would have shown, as a matter of law, that petitioner would have been entitled to more than 756 shares had a liquidation of the manufacturing company actually occurred in regular manner.

II

The effect of the transaction was a purchase back by petitioner of its own stock from which no deductible loss could arise

While we believe the grounds on which the Board of Tax Appeals bases its decision are sound and should dispose of the case, it also seems apparent that the transaction involved is not one from which a deductible loss can arise. This is the theory on which the Commissioner's assessment was originally made.

In effect, petitioner, who, at the request of the manufacturing company, engineered the liquidation of that company (R. 35), purchased back its

own stock which the manufacturing company owned and paid therefor the 4,400 shares of stock of the manufacturing company which petitioner owned. On this theory, the amount or value of the stock which petitioner received upon parting with its stock in the manufacturing company is unimportant, since a corporation can not realize a deductible loss upon the purchase of its own stock. This principle is recognized by Article 862 of Treasury Regulations 45, *supra*, which provides that where a corporation purchases its own stock, either for the purpose of retirement or of holding it in the treasury, or for other purposes, the entire cost of such stock must be deducted from the aggregate invested capital as of the beginning of the taxable year if such a deduction has not already been made. This regulation has been consistently followed by the Commissioner of Internal Revenue for many years in his administration of the taxing statutes and has been approved by the Board of Tax Appeals in several decisions. See *Appeal of Simmons & Hammond Manufacturing Company*, 1 B. T. A. 803.

Even if there were something other than a purchase of stock and the transaction be considered as having been carried out in accordance with petitioner's theory, with regular corporate formalities, the transaction does not disclose a real loss. On this theory there would have been, first, an issuance to

the Walworth & Neville Manufacturing Company, as a stockholder, of its proportionate share of petitioner's reduced stock; next, a distribution in liquidation to petitioner of 756 shares of its own stock as its stockholders' interest in the assets of the manufacturing company. When the stock was issued to the manufacturing company it could have the effect only of decreasing the value per share of petitioner's outstanding stock. When the 756 shares were returned, the per share value of outstanding stock was increased, but no other real effect could have been produced because the only assets the manufacturing company had were the shares of petitioner's stock (R. 31-32), the value of which depended upon the value of petitioner's assets. Not having parted with any of these assets, petitioner could have sustained no real loss, and the decisions of the Board of Tax Appeals cited in petitioner's brief are not in point. On the contrary, upon principle, the case would be essentially similar to the case of *Simmons & Hammond Manufacturing Company, supra*, where it was held that a corporation sustains neither taxable gain nor deductible loss through the purchase and sale of its own stock.

CONCLUSION

The decision of the Board of Tax Appeals is amply supported by the facts in the case and should be affirmed. It is further submitted that the trans-

action involved is not one out of which a deductible loss could arise.

Respectfully,

SEWALL KEY,

MILLAR E. MCGILCHRIST,

Special Assistants to the Attorney General.

C. M. CHAREST,

General Counsel,

Bureau of Internal Revenue,

P. S. CREWE,

Special Attorney,

Bureau of Internal Revenue,

Of Counsel.

SEPTEMBER, 1929.

In the
**United States Circuit Court
of Appeals**

For the Ninth Circuit

No. 5710

WALVILLE LUMBER COMPANY, a corporation,
Appellant and Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

UPON PETITION TO REVIEW AN ORDER OF
THE UNITED STATES BOARD OF
TAX APPEALS.

Reply Brief for Appellant and Petitioner

ANDREW G. ELDER,
JOSEPH NIEVINSKI,

Attorneys for Appellant and Petitioner.

Dexter Horton Bldg.,
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SEP 17 1929
Paul P. O'Brien
Clerk

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In the
**United States Circuit Court
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No. 5710

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Respondent.

UPON PETITION TO REVIEW AN ORDER OF
THE UNITED STATES BOARD OF
TAX APPEALS.

Reply Brief for Appellant and Petitioner

The phases of the Brief for the Respondent which are the subject of this discussion, will be considered in the order presented by the respondent.

RESPONDENT'S STATEMENT OF FACTS.

We have no particular quarrel with the Statement of Facts as presented by the respondent (Resp.'s Br. pp. 6, 7, 8, 9). The appellant, how-

ever, believes that the facts in the case are very clearly set forth in the appellant's opening brief (App.'s Br. pp. 3, 4, 5, 6, 7, 8, 9), and would request the court to adopt the same as the facts of the case.

The petitioner heartily approves of the respondent's last paragraph on page 7 of respondent's brief, which reads as follows:

“At the request of the Walworth & Neville Manufacturing Company, the preferred stock and the common stock which it had coming to it from petitioner were issued directly to the stockholders of the Walworth & Neville Manufacturing Company. In addition thereto, the 756 shares of common stock which were never issued by petitioner represented stock which petitioner would have received if it had issued to the Walworth & Neville Manufacturing Company all of the stock that was due that company when a liquidation of that company had taken place. (R. 7, 66.)”

This is exactly what the petitioner has been contending in this case at all times. It has always been the petitioner's contention that the petitioner in receiving the unissued 756 shares of its own common stock upon the reorganization which took place in 1919, received everything that it was entitled to receive upon a liquidation of the Walworth & Neville Manufacturing Company and received the identical amount of stock that it would have received if a legal liquidation of the Walworth & Neville Manufacturing Company had taken place

at the exact time of the reorganization. We are willing to have this court adopt said paragraph of respondent's brief as the finding of fact upon this particular question.

RESPONDENT'S SUMMARY OF ARGUMENT.

We challenge the first paragraph of respondent's summary argument on page 9 of its brief to the effect that:

“The facts in the case show that petitioner, through a mutual arrangement entered into with the Walworth & Neville Manufacturing Company, voluntarily acquiesced in the surrender of assets which it was entitled to receive upon the dissolution of the manufacturing company in the year 1919.”

There is absolutely no evidence in the record in support of this contention. As pointed out above, respondent in his own statement of facts, contradicts this contention in the last paragraph on page 7 of his brief.

Furthermore, there is no evidence in the record that the petitioner would have received any other assets than the unissued 756 shares of its own stock.

Respondent (Br. p. 8) admits that the Walworth & Neville Manufacturing Company had no assets other than its interest in the stock of the petitioner so that it clearly appears that upon the

legal dissolution of the Walworth & Neville Manufacturing Company, in the year 1919, the manufacturing company had no assets whatsoever.

RESPONDENT'S ARGUMENT.

I.

The facts as established by the record do not support the decision of the Board of Tax Appeals and overwhelmingly support the contention of the petitioner.

The respondent (Br. p. 10) states that:

“The Board of Tax Appeals decided that had petitioner received the assets which it was entitled to receive upon the dissolution of the manufacturing company and which the petitioner could receive and would have received had it not voluntarily agreed to accept less, no loss would have been sustained by it.”

We would call the court's attention to the fact that this is not a part of the board's findings of fact but is merely an assumption which the board indulged in its opinion (Tr. of Rec. p. 34) and that this court is just as capable to decide what conclusion should be drawn from the facts as they appear in the record as was the Board of Tax Appeals.

Furthermore, the respondent never at any time advanced the theory (and that is all that the same may be called) that the petitioner should have re-

ceived more than the unissued 756 shares of its own common stock.

We challenge the respondent to point out a single scintilla of evidence in the record in any way tending to show that the petitioner upon the dissolution of the Walworth & Neville Manufacturing Company should have received something more than the unissued 756 shares of its own common stock. The respondent merely relies upon the conjecture which the board saw fit to indulge in, and studiously refrains from pointing to the evidence in the case.

Respondent (Br. p. 12) charges the petitioner with singling out a portion of the testimony of John H. Neville by which the petitioner claims that the record conclusively established that the unissued 756 shares of stock were all that the petitioner was entitled to receive upon the dissolution of the manufacturing company, had the regular corporate formalities been carried out. The court has the entire transcript of record before it and we invite the court to read the entire "Statement of the Evidence" (Tr. of Rec. pp. 63-74 inc.) as certified by the United States Board of Tax Appeals to determine what the evidence is upon this point.

The testimony of John H. Neville as set out in petitioner's brief (pp. 21, 22) is all of the testimony upon this particular point.

Furthermore, the cross-examination of John H. Neville as conducted by the respondent at the hearing (Tr. of Rec. pp. 67, 68) clearly demonstrates that the respondent concurred in the petitioner's contention that the unissued 756 shares of common stock was all that the petitioner was legally entitled to receive from the Walworth & Neville Manufacturing Company. If the respondent did not believe the statement of John H. Neville, in this regard, why did he not cross-examine him to determine why this was all that the petitioner was entitled to receive.

Furthermore, it must be remembered that the petitioner is a business corporation and certainly must have conducted its affairs in a businesslike manner. Why should the petitioner give away to other people unrelated to it, assets to which it was entitled? Is not the action of a corporation entitled to the presumption of good faith until at least the good faith of the transaction is attacked?

The respondent in its brief (p. 14) states:

“As pointed out by the board in its opinion (R. 34) a distribution by the manufacturing company to its stockholders in proportion to their respective stockholdings, would have given petitioner, who owned 4,400 shares of the 9,000 outstanding shares of the manufacturing company, title to $1,354\frac{1}{4}$ shares of its stock instead of 756 shares which it constructively received.”

Respondent apparently overlooks the fact that the 9,000 shares of the manufacturing company con-

sisted of 1,000 shares of preferred stock and 8,000 shares of common stock and that all of the stock that the petitioner owned was common stock. Respondent apparently in this connection overlooks his own admission in his own statement of facts (Resp. Br. p. 8) to the effect that the Walworth & Neville Manufacturing Company was indebted to its own preferred stockholders. Hence, the so-called mathematical computation referred to by the respondent, has no application in this case as the respondent fails to take into account the outstanding preferred stock.

II.

As pointed out in petitioner's opening brief, the transaction was not a purchase back by petitioner of its own stock and petitioner is not claiming a loss on the purchase back of its own stock but is claiming a loss on its investment in 4,400 shares of stock in the Walworth & Neville Manufacturing Company, which became worthless in 1919.

The respondent admits (Resp. Br. p. 15) that the commissioner made the assessment upon the theory that this transaction was a purchase back by petitioner of its own stock. Also as pointed out by the appellant (App.'s Br. pp. 18, 19), the respondent urged the same contention before the Board of Tax Appeals, and at no time intimated that the petitioner did not receive everything it was entitled to receive upon the dissolution of the Walworth & Neville Manufacturing Company.

The effect of the transaction is not a purchase back of petitioner's own stock but is a loss on petitioner's 4,400 share investment in the common stock of the Walworth & Neville Manufacturing Company. We have no quarrel with the so-called "capital transaction" rule as set forth by the respondent in its brief, and also as set forth in the case of *Appeal of Simmons & Hammond Manufacturing Company*, 1 B. T. A. 803.

Respondent studiously avoids quoting from his cited case, apparently for fear that any quotation therefrom will clearly demonstrate that said case does not apply to the facts in the instant case as pointed out by the Board of Tax Appeals in the case of *Behlow Estate Co. vs. Commissioner of Internal Revenue*, 12 B. T. A. 1365 (Pet.'s Br. pp. 24, 25, 26).

We are unable to follow respondent's argument (Resp. Br. pp. 16, 17) to the effect that:

"Even if there were something other than a purchase of stock and the transaction be considered as having been carried out in accordance with petitioner's theory with regular corporate formalities, the transaction does not disclose a real loss."

We do not know what the respondent means by "real loss." This is entirely a new term to us as the statute speaks of:

“Losses sustained during the taxable year and not compensated for by insurance or otherwise.” (Par. (4) of subdiv. (a) Sec. 234, Revenue Act of 1918.)

The record conclusively shows that the Walworth & Neville Manufacturing Company had no assets of any nature whatsoever at the time it was dissolved. In fact the respondent admits this (Resp. Br. p. 8); hence, petitioner's 4,400 share investment in the common stock of the Walworth & Neville Manufacturing Company became absolutely worthless in the year 1919 and the only thing which petitioner received on account thereof was its unissued 756 shares of its own common stock, having an admitted fair market value of \$107,197.53. In this case the loss is no less real than the loss sustained by the taxpayer in the case of *Callanan Road Improvement Company vs. Commissioner of Internal Revenue*, 12 B. T. A 1109, cited in petitioner's opening Brief (App's Br. pp. 27, 28). In that case, the taxpayer corporation discharged its liabilities for a dividend with property, which at the time of distribution to the stockholders, had a market value of less than the cost to the corporation. The board allowed the taxpayer to deduct as a loss the difference between the cost of the property distributed and the fair market value at date of distribution.

With reference to the decisions cited by the petitioner in its opening Brief, the respondent merely states that the decisions cited are not in

point (Resp.'s Br. p. 17). The respondent studiously avoids analyzing the decisions cited and pointing out wherein they are not in point. We submit that the decisions cited are controlling in this case.

CONCLUSION.

The decision of the United States Board of Tax Appeals is not only not supported by the evidence, but there is no evidence of any kind whatsoever supporting the decision and all the evidence in the case is as contended for by the petitioner.

We submit that the respondent's Brief merely "begs the issue." There is not a scintilla of evidence cited by the respondent in support of the board's assumption that the petitioner did not receive everything it was entitled to receive upon liquidation and dissolution of the Walworth & Neville Manufacturing Company. All of the evidence is overwhelmingly to the contrary. The respondent never raised this contention either in his denial of the loss claimed by the petitioner or in his pleadings before the board or at any time during the hearing. The board itself indulged in the said assumption in its opinion and as heretofore pointed out made no finding of fact upon said point.

Upon the dissolution of the Walworth & Neville Manufacturing Company, no assets of any kind remained on hand and the only thing which the petitioner received on liquidation was its unissued 756

shares of its own common stock and the petitioner is, therefore, entitled to deduct as a loss, the difference between:

- (1) the market value on March 1, 1913, of its 4,400 share investment in the Walworth & Neville Manufacturing Company in the sum of\$225,967.28

and

- (2) the value of the unissued 756 shares of its own common stock of an admitted value of..... 107,197.53
 or a deductible loss of.....\$118,769.75

We respectfully submit that the Order of Re-determination of the United States Board of Tax Appeals entered on May 31, 1928, should be reversed and the cause remanded to said board with instructions to allow the Walville Lumber Company a deductible loss of \$118,769.75 in its income and profits tax return for the year 1919.

Respectfully submitted,

ANDREW G. ELDER,

JOSEPH NIEVINSKI,

Attorneys for Appellant and Petitioner.

United States
Circuit Court of Appeals
For the Ninth Circuit.

GEORGE P. CLARK, Trustee in Bankruptcy of
the Estate of EDNA G. MILENS, Bankrupt,
Appellant,

VS.

EDNA G. MILENS,
Appellee.

Transcript of Record.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON.

FILED

APR 13 1920

PAUL P. O'BRIEN,
CLERK

United States
Circuit Court of Appeals
For the Ninth Circuit.

GEORGE P. CLARK, Trustee in Bankruptcy of
the Estate of EDNA G. MILENS, Bankrupt,
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Appellee.

Transcript of Record.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States for the
District of Oregon.

No. 10,261.

In the Matter of EDNA G. MILENS, Doing Business as GUARANTEE SHOE STORE,
Bankrupt.

**ORDER REQUIRING EDNA G. MILENS TO
TURN OVER TO HER TRUSTEE ASSETS
UNACCOUNTED FOR TO SUCH TRUS-
TEE.**

George P. Clark, the trustee herein, having applied to this Court for an order requiring the bankrupt herein to forthwith account for and pay over to the trustee the sum of \$5,377.36 in cash belonging to said estate in bankruptcy and alleged by the trustee to be in the possession of the said bankrupt and to be concealed by her from her trustee, and an order to show cause having been issued out of this court based upon said petition and served upon the said Edna G. Milens, and a hearing having been had upon said order on the 6th day of July, 1927, at which hearing said Edna G. Milens appeared in person and by her attorney and the Referee having heard the testimony in support of said petition and being fully advised, and a decision having been rendered thereon,—

Now, on reading and filing the petition of George P. Clark, trustee in bankruptcy herein, and con-

sidered the testimony offered in support of said petition, and being fully advised,—

IT IS, UPON MOTION OF COAN & ROSENBERG, ATTORNEYS FOR TRUSTEE, ORDERED that the prayer of the trustee's petition herein be and the same is hereby granted, and IT IS FURTHER ORDERED that Edna G. Milens, the above-named bankrupt, account for and pay over within five days from the date of this order, to George P. Clark, trustee in bankruptcy of the estate of Edna G. Milens, bankrupt, the sum of \$5,377.37, belonging to said estate, and which amount this Court now finds is in her possession and under her control.

(Signed) A. M. CANNON,
Referee.

Dated this 22d day of July, 1927.

Filed November 21, 1927. [1*]

[Title of Court and Cause.]

ORDER DISMISSING CONTEMPT PROCEEDINGS.

Said cause having come on for hearing before the above-entitled court on Monday, the 16th day of March, 1928, upon rule to show cause why Edna G. Milens should not be punished for contempt for failure to obey lawful order, said Edna G. Milens appearing in person and her counsel, James H.

*Page-number appearing at the foot of page of original certified Transcript of Record.

McMenamin, and the Trustee in Bankruptcy herein being represented by Coan & Rosenberg, attorneys at law, and the Court having heard the argument of the respective parties, and having taken said matter under consideration, and being fully advised in the premises, does now

ORDER that said contempt proceedings against said Edna G. Milens be, and the same are hereby, dismissed and she is purged of contempt in said cause.

Signed—R. S. BEAN,
Judge.

Filed this 28th day of April, 1928. [2]

MANDATE.

United States of America,—ss.

The President of the United States of America, to
the Honorable the Judges of the District
[Seal] Court of the United States for the ——
District of Oregon, GREETING:

Whereas, lately in the District Court of the United States for the —— District of Oregon, before you, or some of you, in the Matter of Edna G. Milens, Doing Business as Guarantee Shoe Store, Bankrupt, No. 10,261, an order purging of contempt was duly entered on the 28th day of April, A. D. 1928, in the words following to wit:

“ * * * Order that said contempt proceedings against said Edna G. Milens be, and

the same are hereby dismissed and she is purged of contempt in said cause.

(Signed) R. S. BEAN,

Judge. * * * ”

Which said order is of record and fully set out in said cause in the office of the Clerk of the said District Court, to which record reference is hereby made and the same is hereby expressly made a part hereof, and ———, as by the inspection of the transcript of the record ——— of the said District Court, which was brought into the United States Circuit Court of Appeals for the Ninth Circuit by virtue of an appeal prosecuted by George P. Clark, Trustee in Bankruptcy of the Estate of Edna G. Milens, as appellant, against Edna G. Milens, as appellee, agreeably to the Act of Congress ——— in such cases made and provided, fully and at large appears: [3]

AND WHEREAS, on the 20th day of September, in the year of our Lord one thousand nine hundred and twenty-eight, the said cause came on to be heard before the said Circuit Court of Appeals, on the said ——— transcript of record, and was duly argued and submitted,—

ON CONSIDERATION WHEREOF, it is now here ORDERED, ADJUDGED, and DECREED by this Court, that the decree of the said District Court in this cause be, and hereby is, reversed, with costs in favor of the appellant, and against the appellee, and that this cause be, and hereby is, remanded to the said District Court, with directions

to take further proceedings not out of harmony with the opinion of this Court.

IT IS FURTHER ORDERED, ADJUDGED and DECREED by this Court, that the appellant recover against the appellee for his costs herein expended, and have execution therefor.

(October 8, 1928.)

YOU, THEREFORE, ARE HEREBY COMMANDED, That such execution and further proceedings be had in the said cause in accordance with the opinion and decree of this Court, and —— as according to right and justice and the laws of the United States ought to be had, the said decree —— of the said District Court notwithstanding.

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, the 8th day of November, in the year of our Lord one thousand nine hundred and twenty-eight.

PAUL P. O'BRIEN (Sgd.),
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

AMOUNT OF COSTS ALLOWED AND TAXED in favor of appellant and against appellee as per Annexed Bill of Items, taxed in detail: \$96.40.

(Sgd.) PAUL P. O'BRIEN,
Clerk.

Filed November 16, 1928. [4]

[Title of Court and Cause.]

CITATION REQUIRING EDNA G. MILENS
TO APPEAR AND SHOW CAUSE WHY
SHE SHOULD NOT BE PUNISHED FOR
CONTEMPT.

An order having been made herein by this Court on the 17th day of March, 1928, requiring the bankrupt to show cause why she should not be punished for contempt for having disobeyed the lawful order of Hon. A. M. Cannon, Referee in Bankruptcy dated May 17th, 1927, directing the said bankrupt to pay over to her said trustee in bankruptcy, George P. Clark, the sum of \$5,377.37, and the same having come on for hearing before the above-entitled court and an order having been entered based upon said hearing on the 28th day of April, 1927, purging the bankrupt of her contempt from which order the said trustee, George P. Clark, appealed to the Circuit Court of Appeals for the Ninth Circuit, and this matter having come on to be heard before said Appellate Court, the trustee appearing by and through his attorneys, Coan & Rosenberg, and the bankrupt appearing by and through her attorney, James H. McMenamin, and the said Circuit Court of Appeals for the Ninth Circuit having on the 8th day of October, 1928, filed in said court an opinion upon which opinion, a mandate of said Appellate Court was filed and entered in this court on the 19th day of November, 1928, reversing the order of this Court purging the

bankrupt of contempt and directing the District Court of the United States for the District of Oregon to take further proceedings in this matter not out of harmony with the opinion of said Appellate Court.

Now, on motion of Coan & Rosenberg, attorneys for said trustee,—

IT IS HEREBY ORDERED that Edna G. Milens show cause before this court at the Federal Courthouse in the city of Portland, Oregon, on Monday, the 17th day of December, 1928, at 10 o'clock A. M. on said [5] day or as soon thereafter as counsel can be heard, why she should not be adjudged guilty of contempt of court and be committed by imprisonment by the United States Marshal of the District of Oregon for failure to comply with the lawful order of Hon. A. M. Cannon, Referee in Bankruptcy, dated July 22d, 1927.

IT IS FURTHER ORDERED that service of a copy of this order upon the bankrupt's attorney, James H. McMenamin, shall be sufficient service upon the said Edna G. Milens, if made on or before the 11th day of December, 1928.

R. S. BEAN,
District Judge.

Dated this 11th day of December, 1928.

Filed December 11, 1928. [6]

[Title of Court and Cause.]

ANSWER TO CITATION DATED DECEMBER
11, 1928, REQUIRING EDNA G. MILENS,
BANKRUPT, TO SHOW CAUSE WHY
SHE SHOULD NOT BE ADJUDGED
GUILTY OF CONTEMPT, ETC.

Comes now Edna G. Milens, the bankrupt person above named, and for answer to said citation in said cause bearing date the 11th day of December, 1928, admits, denies and alleges, as follows:

I.

Said bankrupt herewith submits herself to the above-entitled court and throws herself wholly and completely upon the mercy of the Court.

II.

Said bankrupt, in answer to said citation dated December 1, 1928, denies in the premises that she ever disobeyed any rules of the court in the above-entitled cause.

III.

Said bankrupt alleges that the alleged findings of fact in said cause do bear date the 22d day of July, 1927, and said bankrupt admits that she was present at a hearing before said Referee, whereat the matter of Five Thousand Three Hundred Seventy-seven and 37/100 (\$5,377.37) Dollars was a matter of contention before the said court. Said bankrupt alleges with reference thereto that she has no recollection of any order having been served upon her to pay over \$5,377.37, and does not now recollect

any order having been served upon her, requiring her to be and appear for any contempt orders, or with reference to contempt matters, save and except a certain order bearing date March 17, 1928, requiring her to be and appear before the above-entitled court on Monday, the 26th day of March, 1928. [7]

IV.

Said bankrupt further alleges that she takes exception to and denies the correctness of the findings of fact herein, wherein said Referee in Bankruptcy, heretofore, in paragraphs IV, V, and VI, of his said findings of fact, found as follows:

IV.

“The Referee further finds that of the sum of \$5,377.37 withdrawn by the bankrupt from the business in cash, a large amount was drawn therefrom *immediate* preceding the adjudication in bankruptcy herein.

V.

The Referee further finds that the bankrupt, although given every opportunity to explain what has become of said money, has wholly failed to account for the use of said money or to give any plausible explanation as to the use hereof and the Referee finds that said sum of \$5,377.37 was in the possession of the bankrupt at the date of the adjudication in bankruptcy herein and was and now is concealed by said bankruptcy from her trustee in bankruptcy, George P. Clark.

VI.

The Referee further finds that the said bankrupt Edna G. Milens, now has in her possession said sum of \$5,377.37 which she has failed and refused and still fails and refuses to account for or pay over to the trustee and which sum the Referee finds the bankrupt does now knowingly and fraudulently and wilfully conceal from her trustee in bankruptcy."

Said bankrupt alleges, with reference thereto, notwithstanding the findings of said Referee, she did not have in her possession, at any time, said alleged cash of \$5,377.37 and has never had said amount, or any amount of money with reference thereto, then, ever since, or now.

V.

Said bankrupt further alleges that she is wholly and completely financially embarrassed and has been for some time past physically disabled.

Said bankrupt, as affirmative response and defense herein, alleges:

I.

Bankrupt alleges that it has never been shown in the records that said bankrupt had any specific fund or specific property in her possession and further alleges that she has not at any time herein mentioned, had any specific fund or specific property in her possession out of which to comply with said order of said Referee. [8]

II.

Bankrupt further alleges that it has never been

shown in the records that said bankrupt, at any time in the proceedings, could have turned over said specific funds to said trustee of said estate.

III.

Bankrupt further alleges that it has never been shown in the records and in the proceedings that said bankrupt had in her possession at the time said order of the Referee was made, the particular and specific sum of money named in said Referee's order, and bankrupt further alleges that she does not now have, and has not at any time herein, had in her possession the particular and specific sum of money named in said Referee's order and has not, at any time herein, had any sum of money in the premises belonging to said trustee.

IV.

Bankrupt further alleges that it has never been shown in the records that said bankrupt had the physical ability to turn the sums ordered by said Referee over to said trustee, and bankrupt further alleges that she did not have, at any time herein, and does not now have the physical ability to turn over the sums of money to the trustee, ordered to be done by her by said Referee.

V.

Bankrupt further alleges that it has never been shown in said estate that said bankrupt willfully and fraudulently refused to abide by the Referee's order in the premises.

VI.

Bankrupt further alleges that there is a complete

failure of proof in said cause of facts warranting the findings of said Referee in said cause.

VII.

Bankrupt further alleges that she has heretofore, in said cause, filed her petition to be discharged in bankruptcy; that there [9] were no objections filed, save and except, by the J. P. Smith Shoe Company, a corporation, of Chicago, State of Illinois, which objection was filed on the 4th day of February, 1928. Said bankrupt further alleges that she filed her answer thereto; that a hearing was had thereon before said Referee on March 19, 1928; that said bankrupt, in said answer, prayed that the objection of said J. P. Smith Shoe Company, a corporation, be dismissed with prejudice; that said Referee, A. M. Cannon, in said cause, at said hearing on said 19th day of March, 1928, set, as a Special Master, and, as said bankrupt is now informed and believes, did, as such Special Master, deny the prayer of the answer of said bankrupt to said objections of said J. P. Smith Shoe Company, a corporation, to which acts and rulings of said Master, your bankrupt took exceptions, on the ground that said Special Master, as such, at said time and place, acted outside of his authority in such cases made and provided.

VIII.

Bankrupt further alleges and shows to the Court that she has done everything within her power in the premises to keep within the law and to abide by all judgments of the Court and Referee in Bankruptcy herein; that if, in any particular, she has made any

mistake, she alleges that it is without her knowledge and fault; bankrupt further alleges that she makes this answer to said citation of Court, dated December 11, 1928, for the purpose of setting before the Court the facts herein as she knows them, to the end that she may be purged of any contempt of Court herein.

WHEREFORE, said bankrupt prays that said citation be dismissed with prejudice herein; that said bankrupt be purged of any contempt in said cause in the premises; that her petition for discharge in bankruptcy be allowed; that said objections of the J. P. Smith Shoe Company, a corporation, in the premises, be denied with prejudice; that the rulings of said Special Master on legal points in said cause in [10] said hearing on March 19, 1928, be vacated and set aside; for such other and further relief herein to the end that she may be discharged as a bankrupt in said cause, as heretofore prayed for by her.

T. J. CLEETON and
JAMES H. McMENAMIN,
Attorneys for Bankrupt.

(Sgd.) EDNA G. MILENS,
Bankrupt.

State of Oregon,
County of Multnomah,—ss.

I, Edna G. Milens, being first duly sworn, say that I am the bankrupt named in the within entitled cause, and that the foregoing response and answer to citation is true as I verily believe.

EDNA G. MILENS.

Subscribed and sworn to before me this 16th day of December, 1928.

[Seal]

K. B. MEEKER,

Notary Public for Oregon.

My commission expires Nov. 30, 1930.

Due and timely service of the foregoing, and a receipt of a duly certified copy thereof, as required by law, is hereby accepted in Multnomah County, Oregon, on this 16th day of December, 1928.

COAN & ROSENBERG,

Attorneys for Trustee.

Filed December 17, 1928. [11]

[Title of Court and Cause.]

MOTION TO STRIKE OUT ANSWER.

Comes now George P. Clark, trustee in bankruptcy of the estate of Edna G. Milens, doing business as Guarentee Shoe Store, Bankrupt, and moves to strike out answer filed December 17th, 1928, to citation requiring the bankrupt to show cause why she should not be adjudged guilty of contempt on the ground and for the reason that an answer to the original citation requiring Edna G. Milens, bankrupt, to show cause why she should not be adjudged guilty of contempt was filed herein on the 26th day of March, 1928, and is now an answer to the original show cause order in this proceeding, said original show cause order dated March 17th, 1928,

being the only contempt proceeding before this court.

Signed—COAN & ROSENBERG,
Attorneys for Trustee.

To Edna G. Milens, and Her Attorney Jas. H. McMenamin:

Please take notice that in presenting the above motion trustee will rely upon Rules of Practice for Court of Equity for United States, Rule No. 33.

Signed—COAN & ROSENBERG,
Attorneys for Trustee. [12]

State of Oregon,
County of Multnomah,—ss.

I hereby certify that the foregoing is a true and correct copy of the original.

That the said motion in my opinion is well founded in law.

Dated December 19, 1928.

COAN & ROSENBERG,
Attorneys for Trustee.

Due and legal service of the foregoing, by receipt of a duly certified copy thereof, as required by law, is hereby accepted in Multnomah County, Oregon, on this 19th day of December, 1928.

JAMES H. McMENAMIN,
Of Attorneys for Bankrupt.

Filed December 20, 1928. [13]

[Title of Court and Cause.]

OPINION.

Portland, Oregon, January 2, 1929.

R. S. BEAN, District Judge. (Oral.)

This matter was submitted on a petition to punish the bankrupt for contempt. It seems that in June, 1927, the Referee, after a hearing, found that the bankrupt had in her possession the sum of \$5,000 in money belonging to the estate, and made an order directing her to pay it over to the trustee. No attempt was made to have this order refuted or set aside, and in due time the Referee reported the facts to the Court and recommended that the bankrupt be proceeded against for a contempt. The usual case order was made, in obedience to which the bankrupt appeared and answered that she was unable to comply with the order, and the Court, without taking any testimony dismissed the proceedings. Upon appeal it was held that the order of the Referee was conclusive and operated as an estoppel and remanded the case for such further proceedings as might be proper not inconsistent with the opinion, and the question is again before the court.

On the present hearing the bankrupt appeared, testified as a witness under oath that she did not have any money belonging to the estate at the time the Referee's order was made or since, and that she has not now any money or property with which to make the payment, and is wholly unable to do so. This evidence is uncontradicted and unimpeached,

but notwithstanding the trustee insists that the bankrupt should be committed for contempt. For the purpose of this proceeding the findings of the Referee are conclusive upon the parties and a judicial estoppel. It may be that the bankrupt's admission that she has not complied with the order makes out a *prima facie* case for contempt from which she can only purge herself by showing that for sufficient reason [14] she is now unable to obey the order. The burden is upon her to do so, but as stated by the Court of Appeals in the *instance* case, the coercive measure is applied only when and so long as the defendant is able to obey.

The question, therefore, I take it, is whether the bankrupt is at present able to comply with the order, or in other words, whether her failure is wilful or unavoidable, and the Court must be satisfied beyond peradventure of her contumacy before it is justified in committing her for contempt. In some cases it is said the Court must be satisfied beyond reasonable doubt of the person's ability to comply with the order. Such was the holding of Judge Brewster in a recent case in Massachusetts reported in the Bankruptcy reports.

It is argued that because the Referee found that the bankrupt had in her possession the money at the time of the adjudication and that order stands unreversed or unmodified it must be assumed conclusively that she had the money at the time the order was made, and that she can purge herself from contempt only by showing what disposition she made of the money, whether in fact she

had it or not, or regardless of her present ability to comply with the order, but I do not so understand the law. A commitment for contempt is an extraordinary remedy and should be resorted to only when the Court is satisfied of the defendant's present ability to comply with the order. The futility and injustice of depriving an individual of his liberty for failing to do the impossible suggests such a conclusion. No person should be imprisoned for contempt for failing to obey an order to pay over money when his inability to comply therewith conclusively appears. To commit the defendant now for contempt would be a useless proceeding because she could return into court at any time to purge herself by showing that she was unable to comply with the order, and therefore I take it that the petition should be dismissed.

Filed March 28, 1929. [15]

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing copy of opinion of Bean, D. J., dated January 2, 1929, in Cause No. B-10261, in the matter of Edna G. Milens, Bankrupt, has been by me compared with the original thereof, and that it is a correct transcript therefrom, and of the whole of such original, as the same appears of record and on file at my office and in my custody.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said court at

Portland, in said District, this 28th day of March, 1929.

[Seal]

G. H. MARSH,
Clerk.

By L. G. Rogers,
Deputy Clerk. [15a]

[Title of Court and Cause.]

**ORDER DISMISSING CITATION PROCEED-
INGS WITH PREJUDICE.**

The above matter coming on for trial before the above-entitled court on the 26th day of December, 1928, bankrupt appearing in person and by her counsel, T. J. Cleeton and James H. McMenamin, and George P. Clark, trustee in bankruptcy, appearing in person and by his counsel, Coan & Rosenberg, and the Court having taken evidence at said trial and having heard the argument of the respective counsel, and thereafter, having taken said cause under consideration and being now fully informed in the matter, it is by the Court

ORDERED AND ADJUDGED, that the contempt proceedings herein instituted against said bankrupt, Edna G. Milens, be dismissed with prejudice.

Dated this 11th day of January, 1929.

(Sgd.) R. S. BEAN,
Judge.

Filed January 11, 1929. [16]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing copy of order of Referee in Bankruptcy dated June 22, 1927, requiring bankrupt to turn over to trustee assets; order by R. S. Bean, District Judge, dated April 28, 1928, purging bankrupt of contempt; mandate of the United States Circuit Court of Appeals dated November 8, 1928; citation dated December 11, 1928, requiring bankrupt to show cause why she should not be punished for contempt; answer by bankrupt filed December 17, 1928, to citation; motion filed December 20, 1928, to strike out answer; and order by R. S. Bean, District Judge, dated January 11, 1929, purging bankrupt of contempt, have been by me compared with the original thereof, and that each is a correct transcript of the original therefrom, and of the whole of such original, as the same appears of record and on file at my office and in my custody.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of said court at Portland, in said District, this 23d day of March, 1929.

[Seal]

G. H. MARSH,
Clerk. [17]

In the United States Circuit Court of Appeals for
the Ninth Circuit.

In the Matter of EDNA G. MILENS, Doing Business as GUARANTEE SHOE STORE,
Bankrupt.

PETITION FOR ORDER ALLOWING APPEAL
FROM THE ORDER MADE BY THE
DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON
PURGING EDNA G. MILENS OF
CONTEMPT.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Your petitioner, George P. Clark, trustee in bankruptcy of the above-entitled bankrupt estate conceiving himself aggrieved by an order of the District Court of the United States for the District of Oregon entered on the 11th day of January, 1929, dismissing with prejudice certain contempt proceedings against the said Edna G. Milens, bankrupt, for failing to comply with the valid order made by Hon. A. M. Cannon, Referee in Bankruptcy, dated the 22d day of July, 1927, which order required the said Edna G. Milens to pay over to George P. Clark, as trustee in bankruptcy of the estate of Edna G. Milens, bankrupt, the sum of \$5,377.37 found by the Referee to be in the possession and control of said bankrupt on said day and fraudulently and wilfully concealed by her from her trus-

tee, and which order was entered by the District Court of the United States for the District of Oregon following an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from an order entered on the 28th day of April, 1928, dismissing certain contempt proceedings against the said Edna G. Milens, bankrupt, for failure to comply with the valid and lawful order made by Hon. A. M. Cannon on July 22d, 1927, as above stated, and which said order of April 28, 1928, of the District Court of the United States for the District of Oregon upon appeal was reversed by the United States Circuit Court of Appeals for the Ninth Circuit in an opinion filed October 8, 1928, in said court, upon which opinion, a mandate [19] of the United States Circuit Court of Appeals for the Ninth Circuit was filed and entered in the District Court of the United States for the District of Oregon on the 19th day of November, 1928, directing the District Court of the United States for the District of Oregon to take further proceedings in this matter not out of harmony with the opinion of said Circuit Court of Appeals for the Ninth Circuit, which culminated in the order of the District Court of the United States for the District of Oregon dated January 11, 1929, purging the bankrupt of contempt.

Your petitioner does hereby petition for an appeal from said order of January 11th, 1929, of the District Court of the United States for the District of Oregon to the United States Circuit Court of Appeals for the Ninth Circuit, and prays that his

appeal may be allowed and that a citation issue directed to Edna G. Milens, bankrupt, commanding her to appear before the United States Circuit Court of Appeals for the Ninth Circuit, to do and receive what may appertain to justice to be done in the premises, and that a transcript of the record, proceedings and other papers upon which said order was based, duly authenticated, may be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit.

GEORGE P. CLARK,

Trustee in Bankruptcy of Edna G. Milens, Bankrupt.

COAN & ROSENBERG,

Attorneys for the Trustee and Petitioner.

[20]

State of Oregon,

County of Multnomah,—ss.

I, George P. Clark, being first duly sworn, depose and say: That I am the duly qualified and acting trustee of the above estate, that I have read the foregoing petition and that the same is true as I verily believe.

GEORGE P. CLARK.

Subscribed and sworn to before me this 5th day of February, 1929.

[Seal] ABE EUGENE ROSENBERG,

Notary Public for Oregon.

My commission expires Oct. 31, 1931. [21]

[Endorsed]: Petition for Order Allowing Appeal from the Order Made by the District Court of the

United States for the District of Oregon Purging
Edna G. Milens of Contempt. Filed Feb. 7, 1929.
Paul P. O'Brien, Clerk. [22]

In the United States Circuit Court of Appeals for
the Ninth Circuit.

In the Matter of EDNA C. MILENS, Doing Busi-
ness as GUARANTEE SHOE STORE,
Bankrupt.

ASSIGNMENTS OF ERROR.

Comes now George P. Clark, trustee in bankruptcy of the estate of Edna G. Milens, bankrupt, and files the following assignments of error on appeal from an order made and entered by the District Court of the United States for the District of Oregon, on the 11th day of January, 1929, dismissing contempt proceedings against Edna G. Milens and purging her of contempt for failure to obey the order of the Referee made on the 22d day of July, 1927, contrary to the opinion of the United States Circuit Court of Appeals for the Ninth Circuit filed on October 8th, 1928, reversing an order of the District Court of the United States for the District of Oregon and dated the 28th day of April, 1928, dismissing contempt proceedings against Edna G. Milens, bankrupt, and purging her of contempt for failure to obey the order of the Referee made the 22d day of July, 1927, and contrary to the mandate of the United States Circuit Court of

Appeals for the Ninth Circuit in the above case dated November 19, 1928, directing the District Court of the United States for the District of Oregon to take further proceedings not out of harmony with the opinion of the United States Circuit Court of Appeals for the Ninth Circuit.

1. That the United States District Court for the District of Oregon erred in failing and refusing to make and enter an order upon the citation dated December 11, 1928, requiring Edna G. Milens to appear and show cause why she should not be punished for contempt as provided in the opinion of the United States Circuit Court of Appeals for the Ninth Circuit filed in this cause in said appellate court on the 8th day of October, 1928, reversing a prior order of the District Court of the [23] United States for the District of Oregon dated April 28, 1928, purging the bankrupt of contempt upon which opinion a mandate was entered in the United States District Court for the District of Oregon on the 19th day of November, 1928.

2. That the United States District Court for the District of Oregon erred in making and entering an order on the 11th day of January, 1929, dismissing with prejudice the contempt proceedings against the bankrupt, Edna G. Milens, for failure to obey the lawful order of the Referee in Bankruptcy dated the 22d day of July, 1927, requiring said bankrupt to turn over the assets of said estate concealed by her amounting to \$5,377.37 to George P. Clark, trustee in bankruptcy of her estate.

3. That the United States District Court for the

District of Oregon erred in making and entering an order on the 11th day of January, 1929, dismissing with prejudice the contempt proceedings against the bankrupt, Edna G. Milens, without any testimony on behalf of Edna G. Milens, bankrupt, showing the disposition or disappearance of the sum of \$5,377.37, which sum the Referee in Bankruptcy found she had in her possession on the 22d day of July, 1927, and that she was fraudulently and wilfully concealing the same from her trustee upon which finding an order dated the 22d day of July, 1927, by the Referee required Edna G. Milens, the bankrupt, to turn over the sum of \$5,377.37, wilfully and fraudulently concealed by her to George P. Clark her trustee in bankruptcy and which findings and order have never been reviewed, appealed, vacated, modified or reversed.

WHEREFORE, George P. Clark, trustee in bankruptcy of the estate of Edna G. Milens, bankrupt, prays that said order so made on the 11th day of January, 1929, by the District Court of the United States for the District of Oregon may be vacated and that an order be made adjudging and decreeing Edna G. Milens in contempt for failure to obey the lawful order of the Referee in Bankruptcy dated the 22d day of July, 1927, requiring her to pay over to George P. [24] Clark, her trustee in bankruptcy, the sum of \$5,377.37.

COAN & ROSENBERG,

Attorneys for George P. Clark, Trustee in Bankruptcy of Edna G. Milens, Bankrupt. [25]

[Endorsed]: Assignments of Error. Filed Feb. 7, 1929. Paul P. O'Brien, Clerk. [26]

In the United States Circuit Court of Appeals for
the Ninth Circuit.

In the Matter of EDNA G. MILENS, Doing Business as GUARANTEE SHOE STORE,
Bankrupt.

ORDER ALLOWING APPEAL WITHOUT
BOND.

Now, on this 7th day of February, 1929, the above-entitled proceeding coming on regularly to be heard upon petition of George P. Clark, trustee in bankruptcy of the estate of Edna G. Milens, bankrupt, praying that an appeal may be allowed him herein from that certain order of the District Court of the United States for the District of Oregon, made and entered on the 11th day of January, 1929, and that citation issue as provided by law and that a transcript of the records, proceedings and other papers upon which said order was based, duly authenticated, be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, and proper assignments of error having been presented with said petition;

And it appearing to the Court that said petitioner is entitled to said appeal,—

NOW, THEREFORE, on motion of Coan & Rosenberg, counsel for petitioner,

IT IS HEREBY ORDERED that the said petition be and the same is hereby granted and the appeal of the petitioner from said order to the United States Circuit Court of Appeals for the Ninth Circuit is hereby allowed.

And it further appearing that the appellant herein is the trustee in bankruptcy of the estate of Edna G. Milens, bankrupt—

IT IS FURTHER ORDERED that no bond be required of him.

FRANK H. RUDKIN,
Circuit Judge.

Dated this 7th day of February, 1929.

[Endorsed]: Order Allowing Appeal Without Bond. Filed Feb. 7, 1929. Paul P. O'Brien, Clerk. [27]

CITATION ON APPEAL.

District Court of the United States of America,
District of Oregon.

To Edna G. Milens, GREETING:

WHEREAS, George P. Clark, Trustee in Bankruptcy of the estate of Edna G. Milens, bankrupt, has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree rendered in the District Court of the United States for the District of Oregon, in your favor, and has given the security required by law,—

YOU ARE THEREFORE HEREBY CITED AND ADMONISHED to be and appear before said

United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why the said decree should not be corrected, and speedy justice should not be done to the parties in that behalf.

GIVEN under my hand, at Portland, in said District, this 7th day of February, in the year of our Lord one thousand nine hundred and twenty-nine.

FRANK H. RUDKIN,

U. S. Circuit Judge.

Certified copy of the foregoing left at my office this 9th day of Feby., 1929.

JAMES H. McMENAMIN,

Of Attorneys for Trustee of Edna G. Milens, Bankrupt.

[Endorsed]: Citation on Appeal. Filed Feb. 11, 1929. Paul P. O'Brien, Clerk. [28]

[Endorsed]: No. 5713. United States Circuit Court of Appeals for the Ninth Circuit. George P. Clark, Trustee in Bankruptcy of the Estate of Edna G. Milens, Bankrupt, Appellant, vs. Edna G. Milens, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Oregon.

Filed March 27, 1929.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 5713

**United States
Circuit Court of Appeals**

For the Ninth Circuit

GEORGE P. CLARK, Trustee in Bankruptcy
of the Estate of EDNA G. MILENS,
Appellant

vs.

EDNA G. MILENS,
Appellee

BRIEF OF APPELLANT

Upon Appeal from the United States District
Court for District of Oregon.

COAN & ROSENBERG,
710 Pittock Block, Portland, Oregon,
Attorneys for Appellant.

JAMES M. McMENAMIN,
Selling Building, Portland, Oregon.
Attorney for Appellee.

FILED

APR 22 1929

**United States
Circuit Court of Appeals**

For the Ninth Circuit

GEORGE P. CLARK, Trustee in Bankruptcy
of the Estate of EDNA G. MILENS,
Appellant

vs.

EDNA G. MILENS,
Appellee

BRIEF OF APPELLANT

STATEMENT OF THE CASE

At the outset appellant deems it necessary to inform the court that the appeal in this cause is practically identical to the appeal in the case entitled No. 5500, United States Circuit Court of Appeals, for the Ninth Circuit, George P. Clark, Trustee in Bankruptcy of the Estate of Edna G. Milens, Appellant, vs. Edna G. Milens, Appellee.

The appeal in case No. 5500 resulted in an opinion filed October 8, 1928 reversing the District Court of the United States for the District of Oregon and upon which a mandate was filed on the 8th day of November, 1928 over the signature of Paul P. O'Brien, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit; and was spread upon the records of the District Court of the United States for the District of Oregon on the 16th day of November, 1928. (Transcript of Record, page 3).

The facts in the former appeal which appear more fully in the brief of the appellant in case No. 5500 United States Circuit Court of Appeals for the Ninth Circuit are herein set forth briefly as follows:

Edna G. Milens was adjudged a bankrupt on December 3, 1926. On June 23, 1927, George P. Clark, her trustee in bankruptcy, filed a petition praying that an order be made requiring the bankrupt to forthwith deliver and pay over to him, as trustee in

bankruptcy of her estate the sum of \$5,377.37 wilfully and intentionally concealed by her from the said trustee in bankruptcy.

On July 22, 1927, based upon a hearing before Hon. A. M. Cannon, Referee in Bankruptcy on said petition, an order was made and entered by said referee requiring said Edna G. Milens, bankrupt, to account for and pay over to George P. Clark, trustee in bankruptcy of her estate, on or before five days from the date of said order, the sum of \$5377.37 belonging to said estate, and which amount she had in her possession and under her control at said time and which was being fraudulently concealed from her said trustee. (Transcript of Record, page 1).

At said time, namely, on July 22, 1927, findings of fact were made and entered by said Referee, A. M. Cannon, which findings in effect stated that the sum of \$5377.37 was in the possession of the bankrupt at the date of the adjudication in bankruptcy and was concealed by said bankrupt from her trustee

in bankruptcy at the date of the making of said findings; further that the said bankrupt, Edna G. Milens, had in her possession on July 22, 1927, the sum of \$5377.37 which she failed and refused to account for or pay over to her trustee; and further that said sum was knowingly, fraudulently and wilfully concealed by said bankrupt from her trustee.

No appeal or review was taken from said findings of the referee or from the order thereon.

On August 24, 1927, said referee filed a certificate in the District Court of the United States, for the District of Oregon, stating the fact that said bankrupt was in contempt for failure to obey said order and recommended that she be punished for said contempt.

On March 17, 1928, an order was entered in the District Court of the United States for the District of Oregon requiring Edna G. Milens, bankrupt, to show cause why she should not be punished for contempt for failure to obey Referee's order dated July 22, 1927.

On March 26, 1928 there was filed in the District Court of the United States for the District of Oregon an answer by the bankrupt to the order to show cause. Said answer among other things merely stated that she submits herself to the said court, and throws herself wholly and completely upon its mercy.

On March 26, 1928, a hearing was had before the District Court of the United States for the District of Oregon in compliance with said show cause order but the bankrupt did not take the stand, offered no testimony, made no showing as to the reason for her failure to obey the referee's order.

Thereafter and on April 28, 1928, Hon. R. S. Bean, District Judge, entered an order purging the bankrupt of her contempt. (Transcript of Record, page 2.)

From said order of the District of the United States for the District of Oregon, dated April 28, 1928, an appeal was taken to this appellate tribunal. Said appeal was pre-

sented in the usual manner and on October 8, 1928, an opinion was entered by this court reversing the United States District Court for the District of Oregon with directions to take further proceedings not out of harmony with said opinion. Based upon said opinion, a mandate was entered by this court on the 8th day of November, 1928, and spread upon the records of the District Court of the United States for the District of Oregon on November 16, 1928.

On December 11, 1928, there was filed in the District Court of the United States for the District of Oregon, a citation requiring Edna G. Milens, bankrupt, to appear and show cause why she should not be punished for contempt as provided in the opinion of the United States Circuit Court of Appeals for the Ninth Circuit, dated October 8, 1928, based upon the order of the Referee dated July 22, 1927, requiring said Edna G. Milens to account for and pay over to George P. Clark, her trustee in bankruptcy, the sum of \$5377.37. (Transcript of Record, page 6).

On December 17, 1928, Edna G. Milens, bankrupt, filed an answer to said citation dated December 11, 1928. (Transcript of Record, page 6).

On December 17, 1928, Edna G. Milens, bankrupt, filed an answer to said citation dated December 11, 1928. (Transcript of Record, page 8), alleging substantially the same allegations as contained in the answer originally filed by her dated March 26, 1928.

On December 19, 1928, the appellant filed a motion to strike out the answer filed December 17, 1928 by the bankrupt on the ground and for the reason that the answer to the original citation requiring Edna G. Milens to show cause why she should not be adjudged guilty of contempt was filed in the District Court of the United States for the District of Oregon on March 26, 1928, and the answer dated December 17, 1928 is an answer to the original show cause order in the same proceeding dated March 17, 1928, being the only contempt proceeding in this

matter before the District Court of the United States for the District of Oregon. (Transcript of Record, page 14).

On January 2, 1929, Hon. R. S. Bean, District Judge of the District Court of the United States for the District of Oregon, rendered an oral opinion: (Transcript of Record, page 16), after a hearing on the contempt proceeding based upon the citation dated December 11, 1928. Said opinion indicates that the former hearing upon which the order of April 28, 1928 was made (Transcript of Record, page 2) differed from the hearing that resulted in the order upon which this appeal is predicated in that on the first contempt proceeding the District Court, without hearing any testimony by the bankrupt or on the bankrupt's behalf, dismissed the proceedings. Whereas, on the present hearing, the bankrupt appeared and testified as a witness under oath that she did not have any money belonging to the estate at the time the order was made or since and that she has no money or property with which to make the payment

and is unable to comply with the order. No other testimony was offered by the bankrupt.

January 11, 1929 Hon. R. S. Bean, Judge of the District Court of the United States for the District of Oregon, entered an order based upon said opinion commanding that the contempt proceedings instituted against said bankrupt, Edna G. Milens, be dismissed with prejudice. (Transcript of Record, page 19).

This appeal is taken from said order.

SPECIFICATIONS OF ERRORS RELIED UPON

THE FIRST ERROR ALLEGED is the failure of the District Court of the United States for the District of Oregon to make and enter an order upon the citation dated December 11, 1928, requiring Edna G. Milens, bankrupt, to appear and show cause why she should not be punished for contempt as provided in the opinion of the United States Circuit Court of Appeals for the Ninth District

filed in said court in this cause on the 8th day of October, 1928, which said opinion reversed the order of the District Court of the United States for the District of Oregon dated April 28, 1928, purging the bankrupt of contempt, and, upon which opinion of the United States Circuit Court of Appeals for the Ninth Circuit, a mandate was entered and filed and spread upon the records of the District Court of the United States for the District of Oregon on the 16th day of November, 1928.

THE SECOND ERROR ALLEGED is the making and entering of an order by the District Court of the United States for the District of Oregon dismissing with prejudice the contempt proceedings against the bankrupt, Edna G. Milens, without any testimony on behalf of Edna G. Milens, bankrupt, showing the disposition or disappearance of the sum of \$5377.37 which sum the Referee in Bankruptcy found she had in her possession on the 22nd day of July, 1927, and which sum said bankrupt was fraudulently and wilfully concealing from her trustee upon which find-

ings an order dated July 22, 1927 by the Referee was entered requiring said Edna G. Milens, bankrupt, to turn over said sum of \$5377.37, then in her possession, and wilfully and fraudulently concealed by her to George P. Clark, her trustee in bankruptcy and which findings and order has never been reviewed, appealed, vacated, modified or reversed.

POINTS AND AUTHORITIES

I

THE OPINION OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT REVERSING THE ORDER OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON DATED APRIL 28, 1928, PURGING THE BANKRUPT OF CONTEMPT FOR FAILURE TO COMPLY WITH THE REFEREE'S ORDER DATED JULY 22, 1927, AND DIRECTING THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON TO TAKE FURTHER PROCEEDINGS NOT OUT OF HARMONY WITH

SAID OPINION AND WHICH OPINION STATED THAT EDNA G. MILENS, BANKRUPT, HAD FAILED TO PLEAD CONDITIONS OR CAUSES IN HER ANSWER TO THE CONTEMPT PROCEEDINGS ADEQUATE OR SUFFICIENT TO WARRANT HER BEING PURGED OF CONTEMPT MADE IT MANDATORY UPON THE DISTRICT COURT TO COMMIT SAID BANKRUPT FOR CONTEMPT.

George P. Clark, Trustee in Bankruptcy of the Estate of Edna G. Milens, Appellant vs. Edna G. Milens, Appellee, Case No. 5500, United States Circuit Court of Appeals for the Ninth Circuit, Opinion filed October 8, 1928.

II

THE BURDEN OF PROOF IN THE HEARING ON THE CONTEMPT PROCEEDING WAS UPON THE BANKRUPT TO SATISFACTORILY ACCOUNT TO THE DISTRICT COURT FOR THE DISPOSITION OF THE ASSETS BY HER SINCE THE DATE OF THE REFEREE'S ORDER AND SHE CANNOT ESCAPE AN ORDER FOR COM-

MITTAL BY SIMPLY DENYING UNDER OATH, IN HER SWORN ANSWER TO THE RULE TO SHOW CAUSE, THAT SHE HAS ANY ASSETS OR BY TESTIMONY THAT SHE DID NOT HAVE ANY MONEY BELONGING TO THE ESTATE AT THE TIME THE REFEREE'S ORDER WAS MADE, OR SINCE, AND THAT SHE HAS NO MONEY OR PROPERTY WITH WHICH TO MAKE PAYMENT AS PROVIDED BY THE ORDER.

George P. Clark, Trustee in Bankruptcy of the Estate of Edna G. Milens, Appellant vs. Edna G. Milens, Appellee, Case No. 5500, United States Circuit Court of Appeals for the Ninth Circuit, Opinion filed October 8, 1928.

In re Frankel (U.S.D.C.N.Y. So. Dis. 1911) 25 Am. B. R. 920, 922; 184 Fed. 539.

In re Weber Co. (U.S.C.C.A. 2nd Cir. 1912) 29 Am. B. R. 217, 219; 200 Fed. 404.

1 Collier on Bankruptcy (13 Ed.) page 996, Sec. 41.

1 Collier on Bankruptcy (13 Ed.) page 993, Sec. 41.

In re Meier (C.C.A. 8th Cir. 1910) 25 Am. B. R. 272, 275; 182 Fed. 799.

In re Deuell (U.S.D.C. Wes. Dis. Mo.

1900) 4 Am. B. R. 60, 62; 100 Fed. 633.

In *Dittman v. Michelson* (U.S.C.C.A. 3rd Cir. 1922) 48 Am. B. R. 639, 643; 281 Fed. 116.

In *re Power v. Fuhrman* (U.S.C.C.A. 9th Cir. 1915) 34 Am. B. R. 418, 421; 22 Fed. 787.

In *re the matter of George Shelly* (U. S.D.C. So. Dis. Calif. 1925) 6 Am. B. R. (N.S.) 491, 494; 8 Fed. (2nd) 878.

In *re Magen Co. Inc.* (U.S.C.C.A. 2nd Cir. 1925) 7 Am. B. R. (N.S.) 283, 288; 10 Fed. (2nd) 91.

In *Reardon vs. Pensaneau* (U.S.C.C.A. 8th Cir. 1927) 9 Am. B. R. (N.S.) 519, 520; 18 Fed. (2nd) 244.

ARGUMENT

The appellant has already shown in his statement of the case in this brief that this appeal is practically identical to the questions that were raised in the appeal between the same parties herein in case No. 5500 in the United States Circuit Court of Appeals for the Ninth Circuit. Accordingly, appellant respectfully directs the Court's attention to the Transcript of Record, Brief of Appellant,

Brief of Appellee, and the Opinion and Mandate thereon in the former appeal. This reference is requested for the purpose of condensing the argument and citations herein and thereby reducing the expense of a voluminous brief herein to the bankrupt estate.

The errors in the former appeal differ from the errors herein in that the former appeal was based upon the following:

First: The failure of the District Court of the United States for the District of Oregon to accept and adopt the findings and order of the Referee based thereon, and

Second: The making of an order by the District Court of the United States for the District of Oregon purging the bankrupt of contempt although the bankrupt offered no testimony and made no showing and called no witnesses in the contempt proceeding.

The errors relied upon herein are namely:

First: That based upon the opinion of the United States Circuit Court of Appeals for the Ninth Circuit in the former appeal,

an order should have been entered committing the bankrupt for contempt, and

Second: That error was committed by the District Court of the United States for the District of Oregon in purging the bankrupt of contempt with prejudice without any showing by the bankrupt or on her behalf as to the disposition made by her of the assets found to be in her possession by the Referee, which assets the bankrupt was wilfully and fraudulently concealing from her trustee.

Hence, there is one marked difference between this appeal and the former appeal. At the hearing on the first contempt proceeding the bankrupt did not take the stand and called no witnesses so accordingly made no showing as to why she should not be punished for contempt. At the second hearing on the contempt proceeding after the reversal of the former order purging the bankrupt of contempt, she did offer testimony by stating under oath that she did not have any money belonging to the estate at the time the Ref-

eree's order was made, or since, and that she did not then have any money or property to make payment as provided by the order and was wholly unable to do so. (Transcript of Record, Opinion of Hon. R. S. Bean, District Judge, page 16, paragraph 2 thereof).

The bankrupt filed an answer to the original show cause proceeding. Said answer contained no material allegation in answer to the show cause proceeding and the only allegation that could be considered as even relating to the subject was couched in the following language:

“Said bankrupt further alleges that she is wholly and completely financially embarrassed and has been for some time past physically disabled.”

The bankrupt's second answer filed in answer to the citation dated December 11, 1928, upon which the second contempt proceeding was based, contained some changes but set forth no new or material allegation as effecting the proceeding under consideration and contained the same language as in

the former answer herein before quoted.

The opinion of this appellate court in the former appeal, case No. 5500, determined that the allegation above quoted as contained in the bankrupt's answer to the original contempt proceeding was insufficient. This Court, speaking through C. J. Dietrich, Circuit Judge, said as follows:

“The record and the bankrupt's admission that she had not complied with the order made a *prima facie* case of contempt. She could purge herself of the charge by showing that for sufficient reasons, she was unable to obey, but the burden was upon her, by appropriate pleadings and evidence, to make that showing. She not only failed circumstantially or adequately to plead such conditions or causes, but she produced no evidence at all explanatory of her default. Both upon principle and the great weight of authority, we think her showing insufficient.”

Therefore, since the first answer was insufficient and the second answer contained no new allegations it must follow that it, too, was insufficient. Accordingly, the District Court of the United States for the District of

Oregon should have entered an order on the citation dated December 11, 1928 based upon the opinion of this Court committing the bankrupt for contempt as it is axiomatic that the bankrupt could only be purged of contempt upon proof of the allegations contained in her answer and if there are no allegations sufficient in law to excuse her delict commitment should have followed as a matter of law.

The District Court of the United States for the District of Oregon in its opinion dated January 2, 1928 upon the second contempt proceeding, clearly stated the position of appellant in the following language:

“It is agued that because the Referee found that the bankrupt had in her possession the money at the time of the adjudication and that order stands unreversed or unmodified, it must be assumed conclusively that she had the money at the time the order was made, and that she can purge herself from contempt only by showing what disposition she has made of the money, whether in fact she had it or not, or regardless of her present ability to comply with the order, but I do not so

understand the law.” (Transcript of Record, page 17).

That is the argument of appellant. However, the District Court of the United States for the District of Oregon is in error as to the law applying to such a situation. The law is amply set forth in the Brief of Appellant on the former appeal.

This Court has in its opinion on the former appeal in this case stated the rule as contended by appellant:

“But at the threshold of any inquiry the turn-over order must be assumed to have been correct and the presumption of continuing ability to comply must prevail until the defendant satisfies the Court that it no longer exists.”

Hence, the deduction is irresistible that if the ability of the bankrupt to comply continues until the contrary is shown, such a showing would not be inability to comply. The proof would have to show the facts that occurred that removed the ability and not that there was no ability. The only showing made by the bankrupt on the second hearing

was to the effect that she never had the ability to comply. This Court said she is judicially estopped from so asserting. The contempt could only be purged by satisfying the Court as to subsequent conditions that removed her ability to comply. There was no allegation or testimony of such conditons.

Accordingly, the appellant submits that the District Court of the United States for the District of Oregon committed error when it refused to enter the order prayed for in the citation dated December 11, 1928, adjudging the bankrupt guilty of contempt of Court and committing her by imprisonment by the United States Marshal of the District of Oregon for failure to comply with the lawful order of Hon. A. M. Cannon, Referee in Bankruptcy, dated July 22, 1927.

The following authorities unequivocally state the rule as contended by the appellant, namely, that the showing on the contempt proceeding must cover disposition of the assets since the date of the order and not the inability to comply with the order.

1 Collier on Bankruptcy, (13th Ed.) page 996, Section 41, states the rule as follows:

“Upon a motion to punish a bankrupt for contempt because of his refusal to obey the order of the referee directing him to turn over certain property to his trustee, the only question at issue is the disposition of the property by the bankrupt since the date of the order; the bankrupt is estopped from denying that he was in possession of the property directed to be turned over.”

1 Collier on Bankruptcy (13th Ed.), page 993, Section 41, states the rule as follows:

“Property of a bankrupt estate, traced to the recent control or possession of the bankrupt, or a third person is presumed to remain there until he satisfactorily accounts to the court for its disposition or disappearance and that he cannot escape an order for its surrender by simply denying under oath that he has it, or that it is the property of the bankrupt estate.”

In re Meier (C.C.A. 8th Cir. 1910) 25 Am. B. R. 272, 275; 182 Fed. 799, is very similar to the situation at bar in that the bankrupt on a similar hearing to the one under consideration, took the witness stand and stated, as the

bankrupt did in the instant case, that he did not have any property and failed to show any disposition of the money. The Court said:

“But the settled rule is that, when property of a bankrupt estate is traced to the possession of one who receives it upon the eve of bankruptcy of its owner, it is presumed that it remains in his possession or under his control until he satisfactorily accounts to the court of bankruptcy for its disposition or disappearance; that the burden is upon him to satisfactorily so account for it; and that he cannot escape an order for its surrender by simply denying under oath that he has it, or that it is the property of the bankrupt estate. *Muel-ler v. Nugent*, 184 U. S. 1, 7 Am. B. R. 224, 22 Sup. Ct. 269, 46 L. Ed. 405; *Boyd v. Glucklich* (C.C.A., 8th Cir.), 8 Am. B. R. 393. 116 Fed. 135, 143, 53 C. C. A. 451; *Schweer v. Brown* (C.C.A. 8th Cir.) 12 Am. B. R. 178, 130 Fed. 328, 64 C. C. A. 574; *In re Salkey*, 21 Fed. Cas. Nos. 12,253 and 12,254.”

In re Frankel (U.S.D.C.N.Y. So. Dis. 1911); 25 Am. B. R. 920, 922; 184 Fed. 539, District Judge Hand in speaking for the Court said:

“In addition, it is of much authoritative weight that it has undoubtedly been the practice in this district to treat such

orders as conclusive estoppels upon the date of their entry, and to leave open to the respondent only the issue of showing what he has done with the money since that time."

In re Weber Co. (U.S.C.C.A. 2nd Cir. 1912) 29 Am. B. R. 217, 219; 200 Fed. 404, the court said:

"Upon the application to punish for contempt he made no explanation as to how or why it was that this particular sum had disappeared, merely denying that he ever had it. His statement that he had no money, when the proceeding for contempt was instituted, without some such explanation was insufficient and the judge quite properly held him on contempt for not paying it over. To excuse disobedience of the order by such general denial would make it easy to evade the requirements of the Bankruptcy Act."

In the Matter of George Shelley (U.S.D.C. So. Dis. of Calif. 1925) 6 Am. B. R. (N.S.) 491, 493; 8 Fed. (2nd) 878, the court said:

"If that order is not now reviewable by this court, then the only thing to be tried on this proceeding is the question of the disposition of this money by the bankrupt and his sons, since the time of the

order made by the referee. At the hearing there was no effort or attempt on the part of the persons charged to do this. Their position simply was that they never received the money in question and are now not in possession of it. The assertion of present inability to turn over, without further explanation, apparently does not furnish any evidence of what has become of it."

In *re Dittman vs. Michelson* (U.S.C.C.A. 3rd Cir. 1922), 48 Am. B. R. 639, 643; 281 Fed. 116, the court said:

"The orders to turn over being proper, the assets being presumptively in the bankrupt's possession, it will now be for him, in the subsequent proceeding, to show how and when they passed out of his possession. If the fear of incriminating himself prevents him from disclosing what he has done with such assets, that is an unfortunate situation, which the bankrupt has brought on himself; but it nevertheless leaves the case without any explanation by him of what he is now called upon to explain, namely, what he has done with the assets."

In *Power vs. Fuhrman*, (U.S.C.C.A., 9th Cir. 1915), 34 Am. B. R. 418, 421; 22 Fed. 787, the court said:

“Equally plain is it that the burden is upon the delinquent who claims to be incapable of making the delivery decreed, to prove the fact of such inability.”

In re Magen Co. Inc. (U.S.C.C.A. 2nd Cir. 1925), 7 Am. B. R. (N.S.) 283, 288; 10 Fed. (2nd) 91, the court said:

In 1909 the court decided in *Re Stavrahn* (C.C.A., 2nd Cir.), 23 Am. B. R. 168, 174 F. 330, 98 C. C. A. 202, 20 Ann. Cas. 888. In that case the doctrine is stated by Judge Lacombe that, if it is shown that the bankrupt was in the actual possession of a particular sum of money a few months before the turn-over order, it was incumbent on him to give some reasonable explanation as to why it was that he did not turn it over in compliance with the order requiring him so to do. In that case his sole averment was:

“That the reason your deponent has not turned over said sum is because he has no such sum in his possession or under his control, directly or indirectly, and has no means whatsoever of obtaining said sum of money.”

And this court said that his averment 'is too bald, and indefinite to have any persuasive force) * * * *"

In re Reardon v. Pensoneau (U.S.C.C.A. 8th Cir. 1927), 9 Am. B. R. (N.S.) 519, 520; 18 Fed. (2nd) 244, the court said:

"It will be observed that the court put the burden on the trustee, not on the bankrupt. This is the error in law of which complaint is made, and we think it well taken. The order of the referee and that of the court on June 7 each found that Pensoneau had the money in his possession, or under his control when the referee's order was made in April. In the circumstances the trustee could not be expected to know what had happened since the orders were made. Pensoneau, of course, knew what he had done with the \$6,900. The burden was on him, and if he could not convince the court that he had lost possession and control under circumstances which he could not prevent, he should have been held in contempt. On the facts it was twice adjudged that he had the \$6,900. on a named date, and on that date, the referee ordered him to turn over to the trustee. Those were not perfunctory orders. No steps have been taken to vacate them, and we know of no reason to ignore them as not valid and binding. They establish the bankrupt's possession

and control on the day the referee's order was made. The burden was on him to show what disposition had been made of the \$6,900. Until that showing is made relieving him of an intentional loss of its possession and control, it must be presumed that he still has it. *Remington on Bankruptcy*, 3rd Ed., Sec. 2428; *In re Stavrahn* (C.C.A. 2nd Cir.) 23 Am. B. R. 168, 174 F. 330; *In re Weber Co.* (C.C.A. 2d Cir.) 29 Am. B. R. 217; 200 F. 404; *Power v. Fuhrman* (C.C.A. 9th Cir.) 34 Am. B. R. 418, 220 F. 787; *In re Meier* (C.C.A. 8th Cir.) 25 Am. B. R. 272, 182 F. 799; *Good v. Kane* (C.C.A. 8th Cir.) 32 Am. B. R. 19, 211 F. 956. The two cases cited brought under consideration the question of proof in support of a turn-over order. They did not involve the issue we have here, but they are in point on the presumption that possession continues in one shown to have recently held personal chattels until he removes that presumption, and that the burden is on him to do so; and that a bankrupt can not escape an order for the surrender of property belonging to his estate 'by simply denying under oath that he has it.' See also, *In re Graning* (C.C.A. 2nd Cir.) 36 Am. B. R. 162, 229 F. 370."

From the cases cited and the rules therein expounded, the turn-over order dated July 22, 1927 definitely established that the bankrupt had in her possession the sum of

\$5,377.37 which was ordered repaid by her to her trustee. The only fact that would excuse compliance with said order would be testimony produced by her on the contempt proceeding which would show the disposition made by her of said assets since the date of the order. Albeit the original order requiring her to pay the money to her trustee may have been erroneous, said order cannot be challenged on the contempt proceeding. As stated in the opinion by this court on the former appeal:

“It constitutes a judicial estoppel.”

All that the bankrupt attempted to do or did do in the hearing on the second contempt proceeding was to state, under oath, that she did not have any money belonging to the estate at the time of the referee's order or since and that she did not have any money or property with which to comply with the order and that she was unable to do so. Such a showing will not excuse her disobedience. She is judicially estopped from asserting that she did not have the money. The continued

possession of the money by her is presumed until the contrary is shown. The contrary however, was not shown or even alleged.

CONCLUSION

The bankrupt on the contempt proceeding is charged with the duty of pleading and proving the disposition of the assets found to be in her possession on the date of the Referee's order. Those assets are presumed to continue in her possession until the contrary is shown. Two hearings have been had at which not one word of testimony was produced to show the disposition of the assets which she now has in her possession.

It is accordingly respectfully requested that the District Court of the United States for the District of Oregon be directed to imprison the bankrupt for contempt for failure to obey the referee's order dated July 22, 1927.

It is impossible to speculate as to whether the coercive measures will cause compliance

with the referee's order but it is certain that the referee's order will not be complied with unless coercive measures are adopted.

Respectfully submitted,

COAN & ROSENBERG,

Attorneys for Appellant.

United States
Circuit Court of Appeals

For the Ninth Circuit

GEORGE P. CLARK, Trustee in Bankruptcy of
the Estate of EDNA G. MILENS,

Appellant,

vs.

EDNA G. MILENS,

Appellee.

Brief of Appellee

Upon Appeal from the United States District
Court for the District of Oregon.

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Attorneys for Appellee.

County of Multnomah } ss.

I hereby certify that the foregoing is a true and correct copy of the original thereof.

James H. McManis
[Signature]

of counsel for Appellee.

United States Circuit Court of Appeals

For the Ninth Circuit

GEORGE P. CLARK, Trustee in Bankruptcy of
the Estate of EDNA G. MILENS,

Appellant,

vs.

EDNA G. MILENS,

Appellee.

Brief of Appellee

Upon Appeal from the United States District
Court for the District of Oregon.

STATEMENT OF THE CASE

Appellee believes it necessary to inform the court that this cause was once before appealed to this court in case entitled No. 5500, United States Circuit Court of Appeals, for the Ninth Circuit, George P. Clark, Trustee in Bankruptcy of the Estate of Edna G. Milens, Appellant, vs. Edna G. Milens, Appellee.

The appeal in case No. 5500 resulted in an opinion filed October 8, 1928, reversing the Dist-

riect Court of the United States for the District of Oregon and upon which a mandate was filed on the 8th day of November, 1928, over the Signature of Paul P. O'Brion, clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the transcript of Record herein, prepared and filed by appellant, there are set out copies of Record involved, in part, in this cause, to-wit:

	Trans.
Order requiring Edna G. Milens to turn over to her trustee assets unaccounted for to such trustee	1
Order Dismissing Contempt Proceedings	2
Mandate	3
Citation requiring Edna G. Milens to Appear and show cause why she should not be punished for contempt	6
Answer to citation	8
Motion to strike out answer to citation	14
Opinion	16
Order dismissing citation proceedings with prejudice	19
Certificate of U. S. District Court to transcript	20
Petition for order allowing appeal from the order made by the District Court of the United States for the District of Oregon purging Edna G. Milens of contempt	21
Assignments of Error	24
Order allowing appeal without Bond ...	27
Citation on appeal	28

Hence, Appellee does not deem it of any good purpose to again re-write such records verbatim herein.

Appellant, in his brief, predicates his appeal in this cause upon alleged errors of the Honorable District Judge, Robert S. Bean, in dismissing contempt proceedings instituted against the bankrupt herein, Edna G. Milens, and purging her of contempt.

Under the head of "Specifications of Errors," as shown on page nine (9) of appellants brief, it is claimed, in substance, as error on the part of the trial court:

THE FIRST ERROR ALLEGED, is, the failure of the District Court of the United States for the District of Oregon to make and enter an order upon the citation dated December 11, 1928, requiring Edna G. Milens, bankrupt, to appear and show cause why she should not be punished for contempt as provided in the opinion of the United States Circuit Court of Appeals for the Ninth District filed in said court in the cause on the 8th day of October, 1928, which said opinion reversed the order of the District Court of the United States for the District of Oregon dated April 28, 1928, purging the bankrupt of contempt, and, upon which opinion of the United States Circuit Court of Appeals for the Ninth Circuit, a mandate was entered and filed and spread upon the records of the District Court of the United States for the District of Oregon on the 16th day of November, 1928.

THE SECOND ERROR ALLEGED is the making and entering of an order by the District Court of the United States for the District of Oregon

dismissing, with prejudice, the contempt proceedings against the bankrupt, Edna G. Milens, without any testimony on behalf of Edna G. Milens, bankrupt, showing the disposition or disappearance of the sum of \$5377.37 which sum the Referee in Bankruptcy found she had in her possession on the 22nd day of July, 1927, and which sum said bankrupt was fraudulently and wilfully concealing from her trustee upon which findings an order dated July 22, 1927, by the referee, was entered, requiring said Edna G. Milens, Bankrupt, to turn over said sum of \$5377.37 then in her possession and wilfully and fraudulently concealed by her from George P. Clark, her trustee in bankruptcy and which findings and order has never been reviewed, appealed, vacated, modified or reversed.

In discussing these alleged errors, it seems to the appellee that there is but one question involved, to-wit: Whether or not the decision in a contempt proceeding is final, when such proceeding is had and a decision rendered before the court of whom the defendant is alleged to have been in contempt.

Appellee submits that the appellant has not in his brief in this appeal, nor has he in any of the proceedings heretofore had in this action, squarely met the issue. He has at all times predicated the duty of a United States District Court Justice, upon an order made by a referee in bankruptcy in reference to the duties of a bankrupt person; he has at all times ignored and refused to recog-

nize the decision of such a District Court Judge, which decision was based upon findings of fact; he would compel and make mandatory upon such a Judge, a decision which said Judge believes contrary to the facts of the case and contrary to his better judgment, all because the Referee in Bankruptcy has found that the appellee Milens in this action is in alleged possession of a certain sum of money. In other words the appellant herein would tie the hands of the District Court and prohibit it from investigating facts or drawing such conclusions, as such court deemed meet and just.

Under such a theory, it has been contended by counsel for appellant that the bankrupt was conclusively guilty of contempt of court. On the other hand, it is the contention of the appellee that the District Court itself is the sole judge of whether or not is has been held in contempt—not the referee in bankruptcy—not the attorneys for the appellant—and, if Appellee may be permitted to state, not even an appellate court.

It follows then that a court could not, in good conscience, adjudge contempt proceedings without having some knowledge of the facts upon which the proceedings were based—to act otherwise would be to blindfold justice and any decision made under such circumstances could be nothing more than a judicial guess. Apellee admits that the authority upon this point is somewhat in conflict, but believes that the question was very well summarized by the Honorable R. S. Bean, District

Judge of the United States District Court for the District of Oregon, before whom said cause was heard, in his oral opinion after the first hearing of this case, wherein, among other things, he said as follows :

“Now there is a decided conflict in the authorities as to how far, if at all, the Court in a proceeding for contempt for failure to comply with the terms of the order, may go behind the findings of the Referee and examine into the merits of the case, one line of authorities holding that the Referee’s findings are conclusive, and that the only question for the Court in a contempt proceeding for failure to comply therewith, is to inquire what the bankrupt has done with the property since the order of the referee, and whether she had present ability to comply with it. Another line holds that in a contempt proceeding, the court may go back of the order of the referee and examine the facts. The practice seems to have been considered more fully by the Circuit Court of Appeals of the Third Circuit than elsewhere, and the rule there is that in a contempt proceeding, there are two steps: first, the finding of the Referee that the bankrupt had possession of the property which he was ordered to turn over, and that such order is final unless reviewed and, second, a proceeding for contempt, in which the only question is whether the bankrupt is then physically able to comply with the order previously made. BUT WHATEVER THE TRUE RULE MAY BE, THE COURT MAY,

OF COURSE, EXAMINE THE FINDINGS AND ORDER OF THE REFEREE TO DETERMINE WHETHER OR NOT IT WARRANTS THE EXTRAORDINARY POWER OF PUNISHING AS FOR CONTEMPT."

Appellee is of the opinion that the latter part of Justice Bean's summary is what Justice Dietrich meant when he said:

"We are not to be understood as holding that in no conceivable case will the court be warranted in a contempt proceeding such as this, in giving consideration to conditions existing prior to or at the time the turn-over order was made. The nature and purpose of the proceeding is always to be born in mind."

Appellee submits then, that the District Court was not in error in either of the two causes alleged. A CONTEMPT PROCEEDING LIES SOLELY WITHIN THE CONSIDERATION OF THE TRIAL COURT, SOLELY WITHIN THE CONSCIENCE OF THAT COURT AND IS EXERCISED BY THAT COURT FOR THE PURPOSE OF MAINTAINING ITS DIGNITY AND EFFICIENCY. Will an appellant court find this appellee guilty of contempt on a showing of such a character as the record herein discloses, without giving her the benefit of the fact, that reasonable doubt did, or could, arise as would purge her of such a charge? Will an appellant court ignore the fact that such a doubt may have arisen in the mind of the District Judge, who in a second hearing duly had, whereat said appellee was sworn and testified, observed the

witness upon the stand, and heard her, upon oath deny that of which she was charged, and saw that denial stand uncontradicted?

Therefore, since the contempt proceedings have been lawfully determined upon fact by the sound discretion of the District Court, this action and appeal can amount to nothing but an attempted collection of a debt and for that reason also, among others set forth herein by appellee, should fail.

AUTHORITIES AND ARGUMENT

It is said that the power to punish for contempt of court belongs exclusively to the Court offended to judge of contempt and what constitutes contempt. As was said in case of *Oregon vs. McKinnon*, 8 Oregon, page 487,

“While every court and every judicial officer is, under our code, invested with authority to investigate charges of contempt arising from disobedience to it or his lawful judgments, or orders, in the manner provided by the code, and punish those found guilty, it does not follow as a logical necessary consequence that either without express statutory authority can take cognizance of such offenses against the dignity or authority of the other.”

In an action in a state court to release a defendant who had been committed for contempt in a United States District Court the Pennsylvania court said:

“Does anyone doubt the jurisdiction of the District Court to punish for contempt? Certainly not. All courts have this power and

must necessarily have it; otherwise they could not protect themselves from insult, or enforce obedience in their process. Without it they would be utterly powerless. THE AUTHORITY TO DEAL WITH AN OFFENDER OF THIS CLASS BELONGS EXCLUSIVELY TO THE COURT IN WHICH THE OFFENSE IS COMMITTED, AND NO OTHER COURT, NOT EVEN THE HIGHEST, CAN INTERFERE WITH ITS EXERCISE, EITHER BY WRIT OF ERROR, MANDAMUS, OR HABEAS CORPUS."

Passmore Williamsen's Case. 26 Pa. 18.

Appellee calls the attention of the Court to the rule as to conclusiveness of the findings of a lower court in contempt proceedings stated by Justice Story in *Ex Parte Kearney*, 7 Wheaton, 37, wherein it was held that in Habeas Corpus proceedings to release Kearney from prison, he having been committed for contempt for having refused to answer a question as a witness, that the findings of a lower court in contempt proceedings were conclusive. In this opinion Story quoted Justice Blackstone as follows:

"All courts, by which I mean to include the two houses of Parliament, and the courts of Westminster Hall, can have no control in the matter of contempt. The sole adjudication of contempt and the punishment thereof, belongs exclusively and without interfering, to each respective court."

And appellee further contends that no other court or judge can or ought to undertake in a collateral way, to question or review an adjudi-

cation of a contempt made by another court of competent jurisdiction. The following California case is peculiarly in point as upholding the decision of Judge Bean purging the Appellee of contempt in this cause. In the case of *The Seventy Six Land and Water Company, petitioner vs. The Superior Court of Fresno County, respondent*, 93 Cal. 129, the Honorable Justice De Haven said:

“IT WILL BE CONCLUSIVELY PRESUMED UPON APPEAL FROM A JUDGMENT PUNISHING A CONTEMPT THAT THE TRIAL COURT HAVING JURISDICTION IN THE PROCEEDINGS PROPERLY CONSIDERED ALL MATTERS OFFERED BY THE PARTIES IN CONTEMPT, IN DEFENSE OR EXTENUATION, OR SHOWING HIS GOOD FAITH, AND ITS JUDGMENT IS CONCLUSIVE AND MUST BE AFFIRMED.”

In some jurisdictions the law is so firmly established on the question that an appeal will not even be allowed; thus it was held in *Cossart vs. State*, 14 Ark. 538: “Whatever may be the remedy, where the inferior court, in punishing for contempts, shall exceed its lawful authority or jurisdiction, there is none, according to existing law, by writ of error or appeal.”

Again in the case of *People of the Territory of Utah, Respondent vs. Evan R. Owens, Appellant*, 8 Utah, 20, where the defendant was arrested for an attachment for contempt, and from the order appealed, the Appellate court opined as follows:

“WE THINK WE CANNOT REVIEW A PROCEEDING IN CONTEMPT WHEN THE COURT BELOW HAD JURISDICTION. THERE IS NOTHING IN OUR STATUTES ALLOWING AN APPEAL IN SUCH CASES, AND THE RULE OF LAW IS THAT EACH COURT JUDGES FOR ITSELF IN CASES OF CONTEMPT, AND THE JUDGMENT OF THE COURT IS NOT A SUBJECT OF REVIEW BY AN APPELLATE COURT.”

It was also held in the case of the *State vs. Tipton*, 1 Blackford, 166, “The adjudication of a court of a competent jurisdiction respecting contempts, is not subject to the review of any other court.”

While the above cases were appealed from a conviction, and which fact Appellee is fully aware of, yet it must follow that if the judgment of the lower is conclusive upon a conviction, it must also be conclusive where the judgment has purged the defendant of the act. In other words, it is the further contention of the Appellee that the District Court in the case at bar has, and had, authority to inquire whether its orders had been disobeyed, and finding they had been, to enter the order of punishment, and, by the same force of reason, to acquit a person charged with contempt after hearing is had on such contempt charges. And its findings as to the act are not open to review on Habeas Corpus even. This was so held in *In Re Debs*, 158 U. S. 564, where Mr. Justice Brewer said: “The circuit court, having full jurisdiction

in the premises, its findings of fact of disobedience is not open to review on habeas corpus in this or any other court."

Appellee further contends that a proceeding for contempt is regarded as a distinct and independent suit, and a collateral matter. *Ex Parte Langdon*, 25 Vt. 680. "A proceeding for contempt must be regarded as a distinct and independent matter, as much as a new suit and that it required distinct notice as much as a new suit."

It follows then that since the contempt proceeding is a collateral and independent matter, that it is within the province of the court before whom the contempt proceedings are heard to investigate the matters and circumstances surrounding the proceedings. This proposition was upheld by the following authorities:

"In a proceeding to punish a bankrupt for failure or refusal to obey an order of the referee requiring him to surrender to his trustee property alleged to be in his possession and to constitute assets of his estate in bankruptcy, the order of the referee is not conclusive as to the existence of the facts which would justify it, or as to the ability of the bankrupt to comply."

In Re Haring (D. C. Michigan 1912).
193 Fed. 168, Am. Bky. Rep. 285.

"In a proceeding to commit a bankrupt for contempt for refusing to obey an order to turn property over to the trustee, the judge must

examine for himself all the evidence in regard to the bankrupt's conduct, and all other relevant evidence before and since the referee's order."

In Re Elias (D. C. N. C. 1917).
249 Fed. 448.

"On a hearing before the district judge on an order to show cause why a bankrupt should not be committed for contempt for refusing to obey a lawful order of the referee to turn certain property over to the trustee, the judge is not bound by the referee's finding that the bankrupt had the property in his possession or under his control."

In Re Elias, supra.

"Because of the drastic character and the summary procedure in contempt cases, the law requires the court to find the facts upon which orders for imprisonment for contempt are made."

In Re Elias, supra.

Appellee further contends that contempt is: "A wilful disregard or disobedience of a public authority" Dovier's Law Dictionary. That therefore the offense is substantially criminal and the power to punish is vested alone in the court whose judicial authority is challenged.

See *Ex Parte Bradley*, 7 Wall. 364. In this case the Supreme Court of the District of Columbia disbarred Bradley, an attorney at law, for contempt of the criminal court. Mr. Justice Nelson in his opinion said:

“The judges of the court below exceeded their authority in punishing the relator for a contempt of that court on account of contemptuous conduct and language before the criminal court of the District or in the presence of the judge of the same.”

Again in *Kirk vs. Milwaukee Dust Collector Manufacturing Company*, 26 Fed. 501, the court said:

“IT IS A GENERAL AND ELEMENTARY PRINCIPLE THAT THE COURT ALONE IN WHICH A CONTEMPT IS COMMITTED HAS POWER TO PUNISH IT OR TO ENTERTAIN PROCEEDINGS TO THAT END.”

In accord is the case of *In Re Lichfield*, 13 Fed. 863. “Clearly one court cannot punish a contempt against the authority of another.”

The above cases are cited in behalf of Appellee's contention that the judgment of the District Court in the instant case, purging the appellee, is final, and not subject to review or reversal by the Circuit Court of Appeals. The United States Supreme Court has passed upon this question in the case of *Hayes V. Fischer*, 102 U. S. 121, 26 L. Ed. 95. That case was an action for violation of an injunction. The lower court found the Defendant in contempt and imposed a fine, which decision was appealed from. Chief Justice Waite ruled as follows:

“If the proceeding below, being for contempt, was independent of and separate from

the original suit, it cannot be re-examined here either by writ of error or appeal."

And it was held in *King vs. Worten*, 54 Fed. 612, that the case was clearly a contempt proceeding and therefore not appealable.

It is contended for counsel for appellant that the present hearing is substantially the same as a former hearing had between these parties upon appeal. George P. Clark, Trustee in Bankruptcy of the Estate of Edna G Milens, Appellant, vs. Edna G. Milens, Appellee, Federal Case No. 5500. APPELLEE SUBMITS THAT THE FACTS OF THE PRESENT HEARING ARE NOT THE SAME AS THEY WERE IN THE PREVIOUS APPEAL. Since that time, to-wit, on January 2, 1929, a hearing was had on a petition submitted praying for an order to punish the bankrupt for contempt. At that time and before The Honorable R. S. Bean, District Judge, the bankrupt personally appeared upon the stand, testified upon oath before the court and was questioned by him. That testimony stood and now stands uncontradicted. Judge Bean then purged the bankrupt of contempt in an oral opinion, of which the following is a true and correct copy, to-wit:

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE DIST-
RICT OF OREGON

In the Matter of

Edna G. Milens, Bankrupt.

Portland, Oregon, January 2, 1929.

R. S. BEAN, District Judge: (Oral)

This matter was submitted on a petition to punish the bankrupt for contempt. It seems that in June, 1927, the Referee, after a hearing, found that the bankrupt had in her possession the sum of \$5,000 in money belonging to the estate, and made an order directing her to pay it over to the Trustee. No attempt was made to have this order refuted or set aside, and in due time the Referee reported the facts to the court and recommended that the bankrupt be proceeded against for a contempt. The usual case order was made, in obedience to which the bankrupt appeared and answered that she was unable to comply with the order, and the court, without taking any testimony, dismissed the proceedings. Upon appeal it was held that the order of the Referee was conclusive and operated as an estoppel and remanded the case for such further proceedings as might be proper not inconsistent with the opinion, and the question is again before the Court.

On the present hearing the bankrupt appeared, testified as a witness under oath that she did not have any money belonging to the estate at the time the Referee's order was made or since, and that she has not now any money or property with which to make the payment, and is wholly unable to do so. This evidence is uncontradicted and unimpeached, but notwithstanding the trustee insists that the bankrupt should be committed for contempt. For the purpose of this proceeding

the findings of the Referee are conclusive upon the parties and a judicial estoppel. It may be that the bankrupt's admission that she has not complied with the order makes out a *prima facie* case for contempt from which she can only purge herself by showing that for sufficient reason she is now unable to obey the order. The burden is upon her to do so, but as stated by the Court of Appeals in the instance case, the coercive measure is applied only when and so long as the defendant is able to obey.

The question therefore I take it is whether the bankrupt is at present able to comply with the order, or in other words, whether her failure is wilful or unavoidable, and the court must be satisfied beyond peradventure of her contumacy before it is justified in committing her for contempt. In some cases it is said the court must be satisfied beyond reasonable doubt of the person's ability to comply with the order. Such was the holding of Judge Brewster in a recent case in Massachusetts reported in the Bankruptcy Reports.

It is argued that because the Referee found that the bankrupt had in her possession the money at the time of the adjudication, and that order stands unreversed or unmodified it must be assumed conclusively that she had the money at the time the order was made, and that she can purge herself from contempt only by showing what disposition she has made of the money, whether in fact she had it or not, or regardless of her present ability to comply with the order, but I do not so understand the law. A commitment for contempt is an extraordinary remedy and should be resorted to only when the court is satisfied of

the defendant's present ability to comply with the order. The futility and injustice of depriving an individual of his liberty for failing to do the impossible suggests such a conclusion. No person should be imprisoned for contempt for failing to obey an order to pay over money when his inability to comply therewith conclusively appears. To commit the defendant now for contempt would be a useless proceeding because she could return into court at any time and purge herself by showing that she was unable to comply with the order, and therefore I take it that the petition should be dismissed.

I, Mary E. Bell, hereby certify that I acted as official stenographer in the foregoing court at the time the above opinion was rendered; that I took down the same in shorthand, and that the foregoing three pages contain a full, true and correct transcript thereof.

(Signed) MARY E. BELL,

.. *Notary Public for Oregon.*

My commission expires Feb. 21, 1929.

(SEAL)

In view of that hearing and the oral opinion of Judge Bean thereon, Appellee believes that there has been a reasonable showing that the ruling of Judge Bean purging the bankrupt appellee of contempt should stand and that the statement of Judge Dietrich, Circuit Judge, in the former hearing in which he said "But we need not speculate upon what might be a reasonable showing, for here it is not contended that upon a hearing the lower court was convinced that the bankrupt

was without the present ability to obey. She offered no evidence at all," has been answered.

The appellee further contends that in view of the second hearing duly had before the district court, the present case assumes the status of the situation which Justice Dietrich had in mind in his former opinion when he said:

"We are not to be understood as holding that in no conceivable case will the court be warranted in a contempt proceeding such as this, in giving consideration to conditions existing prior to or at the time the turn-over order was made. The nature and purpose of the proceeding is always to be borne in mind."

George P. Clark, Trustee in Bky. of Edna G. Milens, Bkt., Plaintiff vs. Edna G. Milens, Defendant.

SUMMARY

Appellee contends:

First, that the bankrupt has purged herself by her uncontradicted testimony before the District Court on the hearing had January 2, 1929.

Second, The court in which the contempt is alleged to have been committed, and the Judge thereof, is a forum in which this matter shall be, and has been, tried and the Judge of that Court really sits in the same status as a jury in a criminal case and that he has the exclusive authority to determine the matter of whether or not the elements necessary to constitute the criminal con-

tempt existed at the time of the hearing. Appellee further contends that no other Court who was not present at the trial, and did not meet the party proceeded against face to face possesses the power or authority to again pass upon the case as a substitute for the trial Judge who sat at the hearing in the contempt matter, and, therefore, pronounce the punishment to be inflicted. Appellee contends that the hearing of the contempt was a matter peculiarly and exclusively placed in the bosom of the trial Court, who had the inherent and exclusive right and discretion to determine the matter and that the determination of said trial Court purging appellee of contempt is not now subject to review.

As for the contention of counsel for Appellant. They, notwithstanding the law that the decision of Justice Bean in this matter is conclusive, notwithstanding that Justice Bean has twice exercised his judicial prerogative and purged this Appellee of the crime of contempt, and notwithstanding the fact that this Appellee is not, nor has ever been able to pay this money, and in spite of the fact that counsel for appellants know that coercive measures will fail, have tenaciously clung to the assumption that since the Referee in Bankruptcy has said that the bankrupt is in the possession of certain moneys that therefore she must have it.

In spite of position and contention of counsel for Appellant in the instant case, the fact remains and has been found by the District Court, per Judge R. S. Bean, that Appellee has not the

money, and is unable, therefore, to pay. The whole situation reminds Appellee of a story of a certain tribe of natives in India, and a Scientist. These particular people would partake of nothing in the way of food that had had life in it. A scientist exploring that particular country produced a microscope and showed the people that the milk they drank was full of animate matter. Did they then cease drinking milk? No. They destroyed the microscope. Likewise is this case, in spite of the fact that that Appellee has not the money and is therefore unable to produce it, which counsel well know, they would have her committed to imprisonment, destroy the health and freedom of this bankrupt and make her a common criminal.

In the last analysis, the situation is, that regardless of whether or not the Bankruptcy court has said that the bankrupt is estopped from denying her ability to produce the alleged sum of money, yet the matter of contempt, and punishment therefor, is peculiarly within the premises of the court whose orders were alleged to have been disobeyed. That Court, The United States District Court of the State of Oregon, has heard the matter upon two occasions and each time has purged the bankrupt of contempt. Upon one occasion this matter has been before the Circuit Court of Appeals for the Ninth District who did not pass on the matter of contempt, which is the point now at issue, but instead, ruled that the bankrupt is estopped from denying her ability to pay, which ruling was wholly

immaterial to the essence of the case.

In other words the position of the Appellee is that, having been cited for contempt before the Court whose orders she is alleged to have disobeyed and having been purged of said contempt by said court upon two hearings, duly had, that the matter is thereby terminated and it is not then nor thereafter within the province of a higher court to reverse the findings of the lower court.

“It is settled, in the absence of statutory regulation, that the matter of dealing with contempts and how they should be punished are within the trial court’s sound discretion, and that such discretion will not be interfered with unless it has been grossly abused.”

In Re Sobel (N. Y. 1927).

242 Fed. 487.

155 C. C. A. 263.

Appellee leaves the matter to this court. Will it now say that a commitment for contempt is mandatory upon The Honorable Justice Bean, and thereby infer that he has grossly abused his discretion?

Respectfully submitted,

T. J. CLEETON,

JAS. H. McMENAMIN,

WILLIS A. POTTER,

Counsel for Appellee.

United States
Circuit Court of Appeals
For the Ninth Circuit.

LOUIS ONEAL,

Appellant,

vs.

SAN JOSE CANNING COMPANY, a Corpora-
tion,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for
the Northern District of California,
Southern Division.

FILED

MAR 22 1929

PAUL P. O'BRIEN,

CLERK

United States
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Attorneys for Defendant.

In the United States District Court for the South-
ern Division of the Northern District of Cali-
fornia.

EQUITY—No. 1307.

LOUIS ONEAL,

Plaintiff,

vs.

SAN JOSE CANNING COMPANY, a Corpora-
tion,

Defendant.

AMENDED BILL OF COMPLAINT—INJUNCTION, INFRINGEMENT AND ACCOUNTING.

To the Honorable, the United States District Court of the Southern Division of the Northern District of California:

Now comes, Louis Oneal, hereinafter called plaintiff, and files this, his amended bill of complaint, as of course, and for his cause of action against the San Jose Canning Company, a corporation, hereinafter called defendant, respectfully shows:

I.

That for several years last past, the defendant has been, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of California, and having its principal place of business in the county of Santa Clara, State of California.

II.

That on and prior to January 30, 1917, one Anthony Greco, was engaged in devising, inventing and perfecting a new and useful improvement in the device and method of canning string beans and other vegetables, which improvement consisted of a mold for packing full length string beans, asparagus style, and said Anthony Greco was the original, first and sole inventor of said new and useful device and method and the same was not known or used by others in this country and not patented or described in this or any foreign coun-

try, before said Anthony Greco's invention or discovery thereof, and not in public use or on sale prior to his application for a patent thereof.

III.

That on or about May 1, 1917, the said Anthony Greco duly made application to the Commissioner of Patents of the United States for letters patent to said device and invention, and thereafter, to wit: on August 7, 1917, letters patent were duly and regularly issued to said Anthony Greco, numbered 1,235,680, for and to said device and invention, and said letters patent have never been revoked or set aside, and are now in full force and effect, as by a certified copy of said letters patent, in court to be produced, will more fully appear.

IV.

That on or about the 12th day of May, 1923, by an instrument in writing, the said Anthony Greco, duly assigned, transferred and set over unto the plaintiff herein all of his right, title and interest in and to said letters patent and the invention thereby secured, as by the said assignment, in court to be produced, will more fully and at large appear.

That by virtue of the assignment aforesaid, plaintiff became and now is the sole and exclusive owner of said letters patent and of the invention and of all rights secured by said letters patent since the date thereof, and is entitled to be protected in the enjoyment of the same.

V.

That during the year 1922, the defendant recog-

nized the rights of said Anthony Greco in and to said patent and method and made use of said patent and method of canning string beans in its business under a license granted it by said Anthony Greco.

That said license expired after the canning season of the year 1922.

VI.

That during the year 1923 the defendant negotiated with plaintiff for a license under said patent so that it would be able to use said device and method in the canning of string beans during the canning season of the year 1923, but said negotiations were never brought to a conclusion and no license under said patent was issued to defendant for the year 1923.

That said defendant well knowing the rights of plaintiff in and to said device and method and against the will of plaintiff, and in violation of plaintiff's rights, did during the year 1923 make use of said device and method of canning string beans and did can a large quantity of string beans in accordance with said method and by the use of said device, the exact quantity of string beans so canned being unknown to plaintiff.

VII.

That the defendant well knowing the rights of plaintiff in and to said device and method and against the will of plaintiff, and in violation of plaintiff's rights, has been and is now infringing said letters patent within the Southern Division of the Northern District of California by soliciting orders for the sale of string beans canned in accordance with

the method and by the use of the device covered by said letters patent.

That the defendant is threatening to and unless restrained from so doing will proceed at once to can string beans in accordance with said method and by use of said device.

That all of said acts and doings are and will be contrary to equity and good conscience, and tend to the manifest injury of plaintiff.

VIII.

That plaintiff has notified defendant to desist from the use of said device and invention and from the infringement of said patent rights of plaintiff therein and thereunder but notwithstanding such notice the defendant has utterly refused and neglected to discontinue the use of said device and method, all to the great and irreparable damage, loss and injury of this plaintiff.

IX.

That the defendant is financially unable to respond in damages should any be awarded on account of said infringement.

X.

That the profits realized by defendant during the canning season of 1923 by reason of its use of said device and method, amount, as plaintiff is informed and believes, and, therefore, alleges, to approximately Thirty Thousand (30,000) Dollars.

That the profits which will be realized by defendant during the canning season of 1924 by reason of its use of said device and method will, as plaintiff is

informed and believes, and therefore alleges, amount to approximately Forty Thousand (40,000) Dollars.

XI.

That unless a temporary restraining order is granted herein, the string beans canned by the defendant in accordance with said device and method will be distributed throughout the State of California to a great number of wholesalers, dealers, jobbers and retail dealers; that in order to protect his rights plaintiff will be compelled to bring actions against such persons, resulting in vast litigation, endless confusion among the trade, and a tendency to bring the said device and method into disrepute among those persons who are most apt to make use of said device and method and the produce thereof.

WHEREFORE plaintiff prays that pending the hearing and determination of this action, the defendant be enjoined from using said device and invention and that upon the trial thereof, such injunction be made permanent; that defendant be immediately and temporarily enjoined from such use, pending the hearing of plaintiff's application for a preliminary injunction herein; that defendant be compelled to account for any profits realized as a result of said infringement; and that plaintiff have such other and further relief as may be meet and equitable in the premises and recover his costs from the defendant herein.

PRESTON & DUNCAN,
CARLOS P. GRIFFIN,
Attorneys for Plaintiff.

State of California,
County of Santa Clara,—ss

Louis Oneal, being first duly sworn, deposes and says:

That he is the plaintiff named in the foregoing complaint; that he has read the same and knows the contents thereof and that same is true of his own knowledge except as to the matters therein stated on information or belief and as to those matters he believes it to be true.

LOUIS ONEAL.

Subscribed and sworn to before me this 11th day of September, 1924.

J. V. ENDERT,
Notary Public in and for the County of Santa Clara, State of California.

Receipt of a copy of the within amended bill of complaint is admitted this 12th day of September, 1924.

A. SCHAPP,
Attorney for Defendant.

[Endorsed]: Filed September 13, 1924.

(Title of Court and Cause.)

AMENDED ANSWER TO BILL OF COMPLAINT.

The defendant, San Jose Canning Company, for

answer to the bill of complaint filed in the above-entitled cause, says as stated herein:

I.

The defendant, San Jose Canning Company, admits that it is a corporation organized and existing under the laws of the State of California and that it has its principal place of business in the county of Santa Clara as set forth in Paragraph I of the bill.

II.

The defendant admits the issuance to one Anthony Greco of United States letters patent in suit, No. 1,235,680 as set forth in Paragraph 3 of the bill, but, on information and belief, denies that any rights or privileges were secured by said letters patent No. 1,235,680, in and to the improvement, and therefore denies that the plaintiff acquired any rights or privileges by virtue of the issuance of the letters patent and assignment thereof, if any was made, and defendant, on information and belief, says that the said letters patent were surreptitiously and unjustly obtained for that which was in fact invented by others and suggested to said Anthony Greco by what had been disclosed to him by others and by what he had seen in common use and generally on sale, and defendant therefore denies the allegations contained in Paragraph 2 of the bill.

III.

This defendant is not informed, save by the bill, and therefore does not know whether said Anthony Greco made an assignment of said letters patent to

this plaintiff and that this plaintiff is now the owner and holder of the patent in suit, and leaves the plaintiff to strict proof thereof.

IV.

As to Paragraph 5 of the bill, this defendant admits that during the year 1922, he paid to one Anthony Greco the sum of \$500.00 for the purpose of not litigating a patent suit in connection with the patent now in suit, and further says that this sum was paid said Anthony Greco because the latter threatened suit against this defendant during defendant's canning season, and that it was understood between said Anthony Greco and the defendant that the latter would subsequently work under a patent of its own and that the aforesaid payment was made without any acquiescence in the validity of the patent in suit or admission of infringement thereof.

V.

As to Paragraph 6 of the bill, defendant denies that during the year of 1923 it negotiated with this plaintiff for a license under said patent but alleges that it was approached by agents of the plaintiff to pay another sum of \$500.00 for the year of 1923, but that it steadfastly refused to pay said sum or admit the validity of said patent.

VI.

As to paragraph 7 of the bill, defendant positively denies that it ever used the method or device of the patent in suit, or that it ever violated any rights or privileges of this plaintiff, and says that the string beans packed by it were packed in accordance with

answer to the bill of complaint filed in the above-entitled cause, says as stated herein :

I.

The defendant, San Jose Canning Company, admits that it is a corporation organized and existing under the laws of the State of California and that it has its principal place of business in the county of Santa Clara as set forth in Paragraph I of the bill.

II.

The defendant admits the issuance to one Anthony Greco of United States letters patent in suit, No. 1,235,680 as set forth in Paragraph 3 of the bill, but, on information and belief, denies that any rights or privileges were secured by said letters patent No. 1,235,680, in and to the improvement, and therefore denies that the plaintiff acquired any rights or privileges by virtue of the issuance of the letters patent and assignment thereof, if any was made, and defendant, on information and belief, says that the said letters patent were surreptitiously and unjustly obtained for that which was in fact invented by others and suggested to said Anthony Greco by what had been disclosed to him by others and by what he had seen in common use and generally on sale, and defendant therefore denies the allegations contained in Paragraph 2 of the bill.

III.

This defendant is not informed, save by the bill, and therefore does not know whether said Anthony Greco made an assignment of said letters patent to

this plaintiff and that this plaintiff is now the owner and holder of the patent in suit, and leaves the plaintiff to strict proof thereof.

IV.

As to Paragraph 5 of the bill, this defendant admits that during the year 1922, he paid to one Anthony Greco the sum of \$500.00 for the purpose of not litigating a patent suit in connection with the patent now in suit, and further says that this sum was paid said Anthony Greco because the latter threatened suit against this defendant during defendant's canning season, and that it was understood between said Anthony Greco and the defendant that the latter would subsequently work under a patent of its own and that the aforesaid payment was made without any acquiescence in the validity of the patent in suit or admission of infringement thereof.

V.

As to Paragraph 6 of the bill, defendant denies that during the year of 1923 it negotiated with this plaintiff for a license under said patent but alleges that it was approached by agents of the plaintiff to pay another sum of \$500.00 for the year of 1923, but that it steadfastly refused to pay said sum or admit the validity of said patent.

VI.

As to paragraph 7 of the bill, defendant positively denies that it ever used the method or device of the patent in suit, or that it ever violated any rights or privileges of this plaintiff, and says that the string beans packed by it were packed in accordance with

a novel and patentable invention of one Ignatius Rancadore of San Jose, California, secretary and general manager of the defendant, San Jose Canning Company, and patented in the United States, August 14, 1923, United States letters patent No. 1,464,829.

VII.

Defendant, except for the notice afforded by the bill, denies the allegations contained in Paragraph 8 of the bill and says that plaintiff has acquiesced in defendant's use of the device herein complained of, and further says that the plaintiff, well knowing the acts of this defendant, is guilty of laches, and in view of the acts of the parties referred to in Paragraph 4 of this answer, plaintiff is estopped from denying the rights and privileges afforded this defendant through issuance of said United States letters patent to said Ignatius Rancadore and by virtue of the payment of said \$500.00 by said defendant to said Anthony Greco in the year 1922 and says that if any assignment of the letters patent in suit was made to this plaintiff, the latter took title to said patent subject to the terms and conditions of the license between this defendant and said Anthony Greco.

VIII.

Defendant denies the allegations contained in Paragraph 9 and 10 of the bill.

IX.

As to plaintiff's amended bill, defendant denies the allegations contained in Paragraph 10 thereof and says that any possible damage done to this

plaintiff could not exceed the customary royalties paid by others to this plaintiff, and in this connection, defendant alleges, on information and belief, that the plaintiff has granted licenses to various parties to operate under the said patent for nominal sums.

X.

Defendant denies the allegations contained in Paragraph 11 of the amended bill.

XI.

That, on information and belief, the said Anthony Greco was not the original and first inventor or discoverer of the alleged improvement or of any substantial of material part thereof, and that the alleged improvement and all the substantial and material parts thereof, were, long prior to any invention by the said Anthony Greco, known to and used by the following persons at the places hereinafter named and whose last known addresses are hereinafter stated, namely:

Julius Weshnitzer, 1st & Williams Streets, San Jose, California.

Sacramento Canning Company, Sacramento, California.

K. Koblick, 1010 Fillmore Street, San Francisco, California.

Peter Wilhelm, 49 Pine Street, San Francisco, California.

H. Shaw, 3804 Central Avenue, Los Angeles, California.

Gluckman & Strauch (formerly Gluckman & Son), 41 Greene Street, New York, N. Y.

A. B. Newman, 288 East Houston Street, New York,
N. Y.

American Key Can Company, of Chicago, Illinois.

Isleton Canning Company, Isleton, California.

United States Department of Agriculture, F. C.
Blanck (Chemist in Charge Food Control Lab-
oratory).

Pacific Coast Canning Company, Oakland, Cali-
fornia.

H. C. Perry, Loomis, Placer County, California.

O. H. Perry, Manlius, New York.

M. E. Snook, c/o O. H. Perry & Son, Manlius, New
York.

Max Gluckman, 41 Greene Street, New York, N. Y.,

Gluckman, Jr., 41 Greene Street, New York, N. Y.

Toni Cerruti, California Packing Corporation,
Beach & Hyde Streets, San Francisco, Cali-
fornia.

Dominick Cerruti, California Packing Corporation,
San Jose, California.

Baker, Hamilton & Pacific Company, 700-7th
Street, San Francisco, California.

E. F. Curtis, c/o Baker, Hamilton & Pacific Com-
pany, 700-7th Street, San Francisco, California.

George W. Prising, 63 Clay Street, San Francisco,
California.

and others, whose names and places of residence
and use this defendant craves leave to furnish here-
after and to incorporate in its answer.

XII.

That, on information and belief, said Anthony
Greco was not the original and first inventor of the

alleged improvement or of any substantial or material part thereof; but, on the contrary, the alleged improvement and the substantial and material parts thereof was and were, long prior to the date of the alleged invention by said Anthony Greco, set forth in the following letters patents, namely, United States letters patents:

No. 166,667, granted August 10, 1875, to F. Watkins.

No. 266,810, granted October 31, 1882, to E. W. Grove.

No. 326,826, granted September 22, 1885, to C. W. Young.

No. 607,519, granted July 19, 1898, to O. I. Millar.

No. 744,129, granted November 17, 1903, to W. S. Thomas.

No. 932,796, granted August 31, 1909, to C. B. Manbeck.

No. 1,206,877, granted December 5, 1916, to F. P. McCall.

No. 990,479, granted April 25, 1911, to J. Edwards.

No. 999,018, granted July 25, 1911, to J. W. Duncan.

No. 1,058,579, granted April 8, 1913, to G. W. Gwinn.

No. 1,099,791, granted June 9, 1914, to L. Fischer.

No. 1,183,290, granted May 16, 1916, to W. Frost.

No. 1,208,175, granted December 12, 1916, to L. Lipman.

No. 659,337, granted October 9, 1900, to A. W. Brown.

No. 678,110, granted July 9, 1901, to H. H. Spelman.

No. 798,194, granted August 29, 1905, to E. P. Lawton.

XIII.

That, on information and belief, said letters patent No. 1,235,680, do not disclose or show any invention whatsoever in view of the state of the art in the Method of Canning and Packing articles, and particularly methods designed to meet every requirement of the alleged invention of said Anthony Greco, which existed at and long prior to the time that the said Anthony Greco made the alleged invention set forth in said letters patent and that in view of the state of the art, said alleged improvement was not patentable, and involved, if anything, mere mechanical skill, and defendant therefore avers, upon information and belief, that said letters patent are void and invalid in view of the state of the art.

XIV.

The defendant further answering denies that it has infringed upon any rights or privileges of the plaintiff in and to said letters patent in the bill of complaint mentioned, and denies that the plaintiff is and has been injured by any acts of this defendant.

WHEREFORE, the defendant, San Jose Canning Company, having fully answered to the bill of complaint, denies that the plaintiff is entitled to the relief or any part thereof demanded, or to any relief whatsoever, and prays to be hence dismissed

with their reasonable charges in this behalf most wrongfully sustained.

SAN JOSE CANNING COMPANY.

By I. RANCADORE,

Secretary.

A. SCHAPP,

Attorney for Defendant.

R. M. J. ARMSTRONG,

Of Counsel.

AS.BM.

(Title of Court and Cause.)

AFFIDAVIT OF I. RANCADORE.

State of California,

County of _____, —ss.

I. Rancadore, being first duly sworn, deposes and says:

That he is the secretary and general manager of the San Jose Canning Company, a corporation, defendant and cross-complainant in the above-entitled suit; and that he is conversant with the facts in issue; that he has read the foregoing amended answer and that the statements therein are true of his own knowledge except as to those statements made on information and belief and that as to those statements he believes them to be true.

I. RANCADORE.

Subscribed and sworn to before me this 16th day of March, 1925.

[Notary Seal] C. B. SESSIONS,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed March 23d, 1925.

(Title of Court and Cause.)

INTERLOCUTORY DECREE.

The above-entitled matter came on regularly for hearing before the above-entitled court on the 9th day of June, 1925. The plaintiff appeared by his attorneys, Messrs. Preston and Duncan and Mr. Carlos P. Griffin, and the defendant appeared by its attorneys, Mr. R. M. F. Armstrong and Mr. A. Schapp.

Testimony was introduced by both of the respective parties and, the testimony being closed, the matter was afterwards argued by the attorneys for the respective parties and submitted for decision, and the Court, being fully advised in the premises:

IT IS NOW, THEREFORE, HEREBY ORDERED, ADJUDGED AND DECREED that all of the allegations contained in the amended bill of complaint of plaintiff herein, Paragraphs numbered I, II, III, IV, VII and VIII, are true and that defendant is infringing upon the patent and patent rights of said plaintiff and that said plaintiff is entitled to an accounting of the profits made by said defendant as a result of said infringement of

said patent and patent rights for the years beginning with and including the year, 1923, down to the present time;

And Harry M. Wright, Esq., is hereby appointed as a special master to take and report the evidence in such matter, together with his findings and conclusions thereon to this court for approval.

I.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that said Anthony Greco named in the complaint, was the original and first inventor and discoverer of the invention, method and rights covered by the letters patent of said plaintiff numbered 1,235,680, and that said invention, methods and rights covered by the said letters patent of said plaintiff were not known to or used by any of the persons named in said defendant's answer, or any other persons nor were the same set forth in or covered by any of the letters patent mentioned in said defendant's answer but that said letters patent of said plaintiff are valid, and that said plaintiff is entitled to full protection against any infringement thereof.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the said defendant, its agents, servants, employees and all persons acting in aid of said defendant be, and they are hereby perpetually enjoined from making use of or employing;

1. The method of canning beans which consists in arranging the beans in bunch formation within a mold, thence placing one end of the mold with

respect to the open mouth of a can, and finally causing the beans to move from within the mold into the can in bunch formation.

2. The method of canning beans which consists in arranging the beans in bunch formation within a mold, then removing the projecting end of the beans flush with the ends of the mold, thence placing one end of the mold with respect to the open mouth of a can, and finally causing the beans to move from within the mold into the can in bunch formation.

3. The method of canning vegetables of the described class which consists in placing the same in bunch formation within an inclosing mold, thence clamping the mold, thence placing one end of the mold in relation to the open mouth of a can, thence releasing the mold and causing the contents thereof to move into the can.

4. A device for use in the canning of beans and similar vegetables in bunch formation, the same comprising a mold for the reception of the vegetable to be canned, lock means for holding the mold in locked position, and an outwardly projected flange on the mold adjacent one of its ends.

5. A device for use in the canning of beans, the same comprising a mold adapted to receive and encompass the beans in bunch formation, means for holding the mold in closed position, and an outwardly projected flange on the mold adjacent one end thereof adapted to contact with the end of a can.

6. The method of canning beans or similar

elongated vegetables, the same consisting in arranging the vegetables in bunch formation within an encircling mold, closing the mold to encompass the vegetables therein, applying one end of the mold to the open end of a can, and causing the bunch of vegetables to pass endwise from within the mold into the can by application of a slight jar or tap to the mold; the foregoing being the rights secured to said plaintiff by his letters patent numbered 1235680.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that said defendant and all of its agents, employees and servants be, and they are hereby enjoined from making use of the alleged invention covered by U. S. letters patent numbered 1,464,829, and said last mentioned letters patent are hereby adjudged and decreed to be an infringement of the letters patent of said plaintiff.

Done in open court this 23d day of June, 1925.

FRANK H. KERRIGAN,
Judge.

[Endorsed]: Filed and entered June 23d, 1925.

(Title of Court and Cause.)

ORDER MODIFYING INTERLOCUTORY
DECREE.

The motion of defendant for an order modifying the terms of the interlocutory decree, heretofore entered herein to conform to the mandate of the United States Circuit Court of Appeals for the

Ninth Circuit, and for a reduction in the amount of the bond heretofore given by defendant to stay the issuance of a preliminary injunction, came on regularly to be heard at a stated term of the above-entitled court on the 5th day of June, 1926. The plaintiff appearing by Robert Duncan, Esquire, his counsel, and R. M. J. Armstrong, Esquire, of counsel for defendant, appearing on behalf of said defendant. And the motion having been argued and submitted to the Court for its decision, and the Court being fully advised in the premises.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that said interlocutory decree heretofore entered herein be and the same hereby is modified in accordance with mandate of said Circuit Court of Appeals to read as follows, to wit:

IT IS ORDERED, ADJUDGED AND DECREED, that Anthony Greco, named in the complaint herein, was the original and first inventor and discoverer of the device covered by claims 4 and 5 of letters patent issued to said Greco and numbered 1,235,680 and that as to said claims 4 and 5, said letters patent are valid and that plaintiff as successor in interest to said Greco is entitled to full protection against any infringement thereof. That as to claims 1, 2, 3, and 6 of said letters patent it hereby is decreed that the same are and each of them is invalid and that plaintiff has no rights therein or thereunder.

IT IS FURTHER ADJUDGED AND DECREED that defendant infringed upon the patent and patent rights of said plaintiff in the device

covered by said claims 4 and 5 of said letters patent and that plaintiff is entitled to an accounting for all damages suffered from and by reason of the infringement aforesaid beginning with and including the year 1923, down to the present time. That Harry M. Wright, Esquire, be and he hereby is appointed as a Special Master to take and report the evidence on such accounting, together with his findings and conclusions thereon to this court for approval.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, That said defendant, its agents, servants, employees and all persons acting in aid of said defendants be, and they hereby are perpetually enjoined from making use of or employing:

1. A device for use in the canning of beans and similar vegetables in bunch formation, the same comprising a mold for the reception of the vegetables to be canned, lock means for holding the mold in locked position, and an outwardly projected flange on the mold adjacent to one of its ends.

2. A device for use in the canning of beans, the same comprising a mold adapted to receive and encompass the beans in bunch formation, means for holding the mold in closed position, and an outwardly projected flange on the mold adjacent one end thereof adapted to contact with the end of a can.

The foregoing being the rights secured to said plaintiff by claims 4 and 5 of letters patent numbered 1,235,680.

IT IS FURTHER ADJUDGED AND DECREED that the alleged invention covered by U. S. letters patent numbered 1,464,829 is an infringement on said letters patent numbered 1,235,680 and said defendant, its agents, servants and employees hereby are enjoined from making use of said alleged invention.

IT IS FURTHER ORDERED that upon defendant filing a bond, duly approved, in the sum of \$5,000.00, conditioned that said defendant will pay to plaintiff any judgment rendered in the above-entitled action and answer all damages and costs not to exceed said sum of \$5,000.00, the bond heretofore filed herein on the 2d day of August, 1924, in the sum of \$15,000.00, shall be cancelled and the surety thereon exonerated and said bond in the sum of \$5,000.00 shall be in lieu of said bond in the sum of \$15,000.00, and shall stay the issuance of any injunction or execution herein.

Done in open court this 22d day of June, 1926.

FRANK H. KERRIGAN,

District Judge.

[Endorsed]: Filed Jul. 16, 1926.

(Title of Court and Cause.)

ORDER (REQUIRING DEFENDANTS TO
FILE ACCOUNT).

To the Defendant Above Named:

The undersigned, Harry M. Wright, having been duly and regularly appointed as Special Master to

take the evidence in the above-entitled cause and to report his findings and conclusions thereon to the above-entitled court:

NOW, THEREFORE, in pursuance thereof and under Equity Rule No. 63, you, the above-named defendant, are hereby required and ordered to make out and deliver to said Special Master at his office, Rooms 706-711 Foxcroft Building, 68 Post Street, San Francisco, California, within twenty (20) days from the date hereof, a sworn statement of account in debtor and creditor form of the profits made by you from canning string beans, packed asparagus style, during the year 1923 and each year since said time, and in this behalf you are required to state under oath:

(1) The quantity of beans packed by you asparagus style, and the amount of money paid therefor.

(2) The number of cases of such beans sold by you and to whom.

(3) The prices and amounts received therefor and the dates thereof.

(4) Cost of canning such beans, giving the items of such cost and the cost of each item.

(5) Cost of sale or marketing.

(6) Any other costs properly itemized.

(7) The profits derived by you in such business.

The above statement shall be made for each year separately, beginning with the year 1923.

You are also required to serve a copy thereof on Messrs. Preston and Duncan, attorneys for said plaintiff, at their offices, Rooms 1012-1019 Hobart

Building, 582 Market Street, San Francisco, California.

Dated this 1st day of September, A. D. 1926.

H. M. WRIGHT,
Special Master.

Due service and receipt of a copy of the within order admitted this 1st day of September, 1926.

R. M. J. ARMSTRONG,
Attorney for Defendant.

[Endorsed]: Filed June 8th, 1928.

(Title of Court and Cause.)

SWORN STATEMENT OF ACCOUNT.

It is contended that the order dated the 1st day of September, A. D. 1926, is too general and that it is not in conformity with the opinion of the Honorable Circuit Court of Appeals, dated January 18, 1926.

The contested matters in this case cannot justly, to a needful investigation by the Master, be said to embrace anything other than a true account of the profits accrued from the infringement of the aforementioned claims 4 and 5 of the patent, the only claims found to be for a valid patentable invention, and an accounting to be rendered at this or at any other time must be in respect of a narrower issue to matters in actual controversy between the parties, namely, an ascertainment of the true value to the defendant from its use of the specific device covered by said claims.

The patent in suit contained six claims, four of which are for a method of canning beans, and the remaining two claims are as follows:

4. "A device for use in canning of beans and similar vegetables in bunch formation, the same comprising a mold for the reception of the vegetable to be canned, lock means for holding the mold in locked position, and an outwardly projected flange on the mold adjacent one of its ends."

5. "A device for use in the canning of beans, the same comprising a mold adapted to receive and encompass the beans in bunch formation, and an outwardly projected flange on the mold adjacent one end thereof adapted to contact with the end of the can."

Claim 6 is as follows:

6. "The method of canning beans or similar elongated vegetables in bunch formation within an encircling mold, closing the mold to encompass the vegetables therein, applying one end of the mold to the open end of the can, causing the bunch of vegetables to pass endwise from within the mold into the can by the application of a slight jar or tap to the mold."

Claims 1, 2 and 3 of the patent in suit are somewhat similar in purpose and scope as claim 6 above referred to, and as regards these alleged method claims, the Honorable Circuit Court of Appeals said:

"But we see no merit in the claims for the method of canning beans by arranging them

in bunch formation within an encircling mold, then placing one end of the mold in contact with the open end of a can, causing the beans to move from the mold into the can. Such a process amounts to nothing more than the obviously necessary manner of operating the mechanism. (*Risden Locomotive Works vs. Medart*, 158 U. S. 68; *Vapor Car Heating Co. vs. Gold Car H. & L. Co.*, 7 F. (2d) 285.

The result of these views is that the decree of the District Court is affirmed in so far as it decrees in favor of appellee sustaining the validity of claims 4 and 5 of the patent to Greco and adjudges that those claims have been infringed by the San Jose Canning Company and in so far as it orders a reference to take an account in profits and damages in respect to such infringement. In so far as the decree sustains the validity of the other claims of the patent it is reversed and the injunction with respect to such other or method claims, must be dissolved.

Upon remand the District Court is directed to take such proceedings as shall be according to law and not inconsistent with this opinion.

Costs on appeal to be equally divided.

Affirmed in part and reversed in part."

Therefore, a sworn statement of account in debtor and creditor form of the profits made by the defendant should properly be formulated by calculating the advantage which the defendant derived from using the complainant's invention as

covered by the aforementioned claims 4 and 5 of the said patent, over what it could have derived from using any other thing or device, process or method, which was known prior to the invention. Complainant, it is thought, is bound to accept as profit nothing more than the advantage effected as a saving of labor by the defendant in the latter's use of the device covered by claims 4 and 5 of the patent. But complainant is estopped from demanding a sworn statement of account in debtor and creditor form of the profits made by defendant from canning string beans, packed asparagus style. The doctrine of standard of comparison applies in any case where a defendant in a patent suit has at his free use and disposal that thing, instrumentality, process or method which may be the next best means for carrying out the particular function or result sought to be attained, citing *Walnut Growers' Assn. vs. Anderson-Barngrover Mfg. Co.*, 166 F. 443, 92 C. C. A. 295; *Doten vs. City of Boston*, 138 F. R. 406, 1905; *Schmertz Wine Glass Co. vs. Western Glass Co.*, 203 F. 1006, decree modified *Western Glass Co. vs. Schmertz Wine Glass Co.*, 226 F. 730, 141 C. C. A. 486; *Brown vs. Lanyon Zinc Co.*, 179 F. 309, 102 C. C. A. 497; *Canda Bros. vs. Michigan Malleable Iron Co.*, 152 F. 178, 81 C. C. A. 420 (C. C. 1910); *American Street Flushing Machine Co. vs. St. Louis Street Flushing Machine Co.*, 180 F. 759, decree affirmed 192 F. 121, 112 C. C. A. 582; *Brookfield vs. Novelty Glass Mfg. Co.* (C. C. 1908), 179 F. 830; affirmed *Novelty Glass Mfg. Co. vs. Brookfield*, 170 F. 946, 95

C. C. A. 516; Seeger Refrigerator Co. vs. American Car & Foundry Co., 212 F. decree 219 F. 565, 135 C. C. A. 333, and in Brown Bag Filling Machine Co. vs. Drohen, 175 F. 576, 99 C. C. A. 192, it was held "That the profits realized by a defendant from the use of an infringing bag filling machine were properly computed on the basis of the saving as compared with the cost of filling by hand, where there was no prior machine which would do the work." In Mowry vs. Whitney, 14 Wallace, 651, 1871, the advantage was a saving of materials and labor, realized from the use of the complainant's process in manufacturing car-wheels, as compared with what would have been necessary to expend in producing similar car-wheels, salable at the same price, without the use of that process. In Cawood patent, 94 U. S. 709, 1876, the advantage was a saving of labor and of fuel, realized from the use of the complainant's swage-block in mending the exfoliated ends of iron railroad rails, as compared with the labor and fuel it would have been necessary to expend in mending those rails upon a common anvil. And in Conover vs. Mevs, 11 Blatch. 198, 1873, the advantage was a saving of labor in splitting kindling wood by means of the patented machine of the complainant, as compared with the labor which would have been required to split the same quantity of wood by hand, or by any other machine. In Webster Loam Co. vs. Higgins, 43 F. R. 675, 1890, the advantage was a saving of machinery for weaving carpets; it appearing, in the aspect of the proofs most favorable to the com-

plainant, that the defendants could have made all the carpeting they did make, if instead of using their sixty-one infringing looms, they had used twice that number of noninfringing looms. On this basis, the complainant contended that it was entitled to recover all the profits which were made by the defendants, on those yards of carpeting which they made on the sixty-one infringing looms, over and above the much smaller number of yards which they could have made on sixty-one noninfringing looms. But that contention was overruled, nothing hindered the defendants from using one hundred and twenty-two noninfringing looms, instead of sixty-one infringing looms, and that the cost of the use of whatever number of noninfringing looms would have been necessary to make the carpeting which was made on the sixty-one infringing looms, was the proper standard of comparison in the case.

In the instant case, this defendant had opened to him a large number of different mechanical devices for packing beans and is capable of furnishing convincing evidence upon this question of the standard of comparison. If, by using the infringing device, the defendant saved on the packing of thirty thousand cases of beans in the period of time representing the infringing interval, the sum of 2¢ per case, the entire sum in profits due the complainant would be six hundred dollars (\$600).

DAMAGES.

Covering the canning season of the year 1922, defendant was licensee of the complainant under

the patent in suit. Defendant paid to complainant as consideration for the license the sum of \$500.00. On or about the 3d day of July, 1923, complainant offered to renew the license with the defendant covering the use of the patented invention for the canning season of 1923. The consideration for the 1923 license was to be for the same sum as provided for in the license between the parties in the year 1922. Defendant refused to admit the validity of the patent in suit and the license offered defendant to renew the former license was not accepted.

Defendant has used the infringing device during its canning seasons of 1923 and 1924, and it is thought that the loss by the complainant of license fees that he may have been entitled to for these periods, commensurate with the license fee for the year 1922 is the more than reasonable criterion of the complainant's damage. The actual damage done the complainant could not possibly be for a sum in excess of \$1,000—at the rate of \$500 for each infringing year wherein the device complained of was employed by defendant. In this connection, it should be borne in mind that when the defendant paid over to the complainant the sum of \$500.00 for the license in the year 1922, the patent in suit was presumed to be valid as to all of its claims. Had the method claims of the patent been found to be for a new and patentable invention and accordingly valid and infringed by the defendant, it is only reasonable to say that the value of any license given under the patent

would have been greater or perhaps in proportionate keeping with the license fee covering said period of 1922. But, where on adjudication it is found that as to the method claims, such claims are invalid and not infringed by this defendant it is certainly manifest that the value of any license received under the patent has very materially depreciated. Where an inventor finds it profitable to exercise his monopoly by selling licenses he has himself fixed the average of his actual damage when his invention has been used without his license. If he claims anything above that amount, he is bound to substantiate his claim by clear and distinct evidence. As to this, the best evidence, no doubt, is the assignment made and entered into on the 12th day of May, A. D. 1923, by and between Anthony Greco, the patentee and the complainant Louis Oneal, acting as Trustee with rights and privileges to vend rights under said patent; to grant licenses thereon and thereunder; to make royalty contracts or agreements respecting same; to manufacture and rent or sell and rent any and all devices covered by said patent as recited in said assignment. The estimation of damages must be confined to the particular part of the machine covered by the patent upon which suit is brought. *McCreary vs. Pennsylvania Canal Co.*, 141 U. S. 459, 12 S. Ct. 40, 35 L. Ed. 817; *Fischer vs. Hayes*, 22 Fed. 529; *Burdell vs. Denig*, 4 Fed. Cas. No. 2,142, *Fish Pat. Cas.* 588; *Carter vs. Baker*, 5 Fed. Cas. No. 2,472, 4 *Fish. Pat. Cas.* 404, 1 *Sawy.* 512;

Wayne vs. Holmes, 29 Fed. Cas. No. 17,303, 1 Bond, 27, 2 Fish. Pat. Cas. 20.

Whenever equity has jurisdiction to decree an account of the defendant's profits, it also has jurisdiction to assess the damages which the complainant sustained on account of the defendant's infringement. Having ascertained the amount of both, if the profits are found to exceed the damages, the Court will enter a decree for their recovery, and will do nothing further about the damages. Where the accounting shows no such profits, but does show such damages, the Court will enter a decree for the amount of the latter. Where the accounting shows both profits and damages, and shows the latter to equal or exceed the former, a decree will be entered for the amount of the damages. *Birdsall vs. Coolidge*, 93 U. S. 64, wherein it was held "that when it appears in a case in equity, that the defendant's profits, derived from the use of the plaintiff's invention, do not amount to so much as the plaintiff's damages arising from the infringement, the Court may add to the amount of the defendant's profits a sum sufficient to make the amount awarded by the decree equal to the plaintiff's damages. The two claims found to be valid in the patent in suit form an insignificant part of the alleged invention.

It is well recognized that "what the infringer makes is 'profits,' what the owner of the patent loses by the infringement is 'damages.'" In all of these cases, the burden rests upon the complainant to establish, in every suit for patent infringe-

ment, the validity of his patent. In the instant case, the only valid claims are 4 and 5 on the article. Not a single claim remains in the patent covering any new method or process of packing string beans or other vegetables. But even as to the two claims found valid and infringed, it cannot be said that the defendant confines itself solely to such structure recited and covered by those claims, as the infringing structure embodies other matter, which is a factor in the profits realized by its use, and the burden of proof is upon the complainant to segregate the part of the profits arising from the infringement from the general profits accrued from the infringement, citing *Elizabeth vs. Nicholson Pavement Co.*, 97 N. S. 126, 24 L. Ed. 1000; *Garretson vs. Clark*, 111 U. S. 120, 28 L. Ed. 371; *Canda Bros. vs. Michigan Malleable Iron Co.*, 152 Fed. Rep. 178, 81 C. C. A. 420; *Keystone Mfg. Co. vs. Adams*, 729, 151 U. S. 148, 38 L. Ed. 103.

And as to liability of the user for profits by use alone of the device complained of the Supreme Court has said:

“On the second hearing before the Master, it was shown and he so found and reported, that there were methods and furnaces, and other than those of the plaintiff’s and other than those burning dry fuel alone, which would produce the same results in generating heat, for the purposes for which the defendants used the heat, and which methods and furnaces they had a right to use, and that the savings to them of profits made by them, by use of the plaintiff’s inventions, over the other

furnaces, was not proved. Such being the case, the report could not have been otherwise than it was.

“It does not always follow that because a party may have made an improvement in a machine and obtained a patent for it, another using the improvement and infringing upon the patentee’s rights will be mulcted in more than nominal damages for the infringement. If other methods in common use produce the same results, with equal facility and cost, the use of the patented invention cannot add to the gain of the infringer, or impair the just rewards of the inventor. The inventor may indeed prohibit the use, or exact a license fee for it, and if such license fee has been generally paid, its amount may be taken as the criterion of damage to him when his rights are infringed. In the absence of such criterion, the damages must necessarily be nominal.” (Mr. Justice Field, in *Black vs. Thorne*, 111 U. S. 122, 28 L. Ed. 372, and, quoting from *Hopkins on Patents*, Vol. 1, page 613, we find that—

“The curious suggestion of the foregoing quotation is that there may be a valid patent for a new machine which produces the same results, with the same facility and at the same cost as the machine of the prior art. But from another view point it would seem that these expressions were employed to show that unless the complainant shows a saving, in time, money or otherwise by the use of his invention, or that it accomplishes a new result, it cannot be presumed that the defendant user has

profited by the use of the invention; if no such saving or advantages in the use of the patent exists, it can hardly possess the essential requirements of a valid patent, and it is, indeed, difficult to see why an accounting should be ordered, as against one who infringes by use alone.”

Defendant has infringed no valid method claims of the patent in suit. It did use a device which the Honorable Court above held to be an infringement of the specific article claims 4 and 5 of the patent.

Counsel for defendant believes that he is fully justified at this time in bringing these matters to the attention of the Master. However, and for the purpose and for such advantage and effect as it may have the statement of account in debtor and creditor form of profits made in the packing of beans by means of the invalid method (Claims 1, 2, 3 and 6) and with the device (valid claims 4 and 5) is furnished herewith.

In support of the law that “the advantage which a defendant derives from using complainant’s patented invention over what it could derive from any other process or thing which was known prior to that invention constitutes the profits which the complainant is entitled to recover, where the amount can be ascertained with a reasonable degree of certainty,” defendant submits this, a true summary of the cost to it in packing its beans by one of the next best known ways as against the amount which the defendant realized in saving of time and labor through use of the device, claims 4 and 5 of the

patent in suit. Defendant has separated the profits due to the infringing device from those due to the noninfringing device and it is believed that any recovery above such nominal amount as the Honorable Master shall allow will be according to law and not inconsistent with the opinion of the Honorable Circuit Court of Appeals.

The points discussed cover the main question before the Master where the suit, originally brought on six patent claims, is now reduced to two. If, as the Honorable Court above said, "But we see no merit in the claims for the method of canning beans by arranging them in bunch formation within an encircling mold, then placing one end of the mold in contact with the open end of a can, causing the beans to move from the mold into the can" * * * what is the value through use by defendant of (1) lock means for holding the mold in locked position, and (2) an outwardly projected flange on the mold adjacent one of its ends, as set forth in claim 4, or the value of the sole projected flange on the mold as set forth in claim 5? What, (if any) profit, or damage, was attributable to defendant's use of said flange or said lock means or both? Beans can be packed with employing either of the limitations of the specific claims 4 and 5 which are for the article *per se*. Defendant knows what it costs it to pack beans by the hand method. It does not follow from the mere fact of use that defendant profited by its use of the invention. But apportionment is required in the case of a patented improvement

which contributes to a machine only part of the whole value, and the present case is in that category. Defendant does not wish to confuse values or profits; nor will it place any difficulty in the way of an equitable apportionment of profits, but the burden of proof is on complainant. Defendant has taken up this question of burden of proof, and in the foregoing has demonstrated the unsoundness and falsity, in fact, of all complainant's assertions, assumptions and theories advanced up to this time on this question of profits and damages. Defendant will assume the burden of proof under the rule of *Westinghouse vs. Wagner* (225 U. S. 604). It will furnish the facts needed to discover what value in use is apportionable to the Greco improvements, and from these facts only a nominal recovery can lawfully be deduced.

On this question of profits, damages and apportionment, and the advantage, if any, derived by the defendant by its use of the invention, the record of the case speaks for itself. It makes clear the fact beyond any peradventure of doubt that if the method claims of the patent fell (found invalid), there was left little or nothing of value. Proof of this may be clearly gathered from the words of the witness Carlos P. Griffin (Trans., p. 78) when he said in answer to the question appearing at the bottom of Trans., p. 77, "No, it doesn't, because the beans can be put in the mould in any one of a number of different ways, and I might throw the mould out of the window or throw it out in the street." It would seem from this

statement of the expert witness that the physical specific mould was entirely unnecessary and superfluous. It had no real value except that which might fairly cover its bare cost of manufacture. In other words, the witness could use his hands to pack beans and still come within the method claim. And the question (Trans., p. 75) brought forth the answer (Trans., p. 76), "It would depend entirely upon whether the product was so near this product as to be suggestive of the process, and whether that process had actually been used previously." On this point, the patent in suit, lines 99, 100 inclusive thereof, says:

"While the invention has been described for use in connection with the canning of beans, it is obvious that the same is applicable to the canning of asparagus or any similar vegetable desired to be placed within cans in bunch formation."

The application of the patent in suit was filed in the Patent Office May 7, 1917.

The very obvious use of the invention in the packing of asparagus had been resorted to by Perry as far back as 1912 (Sup. Trans., p. 18). Obviously string beans and asparagus are the same for the purpose of the invention. Perry had outgrown the idea of [110] placing the asparagus stalks in the can singly. He adopted the more modern way of putting them all in at once by means of a mold.

Perry's mold was old and well known for many years prior to any date of invention of the device

covered by the patent in suit. Asparagus and beans are similar. The mold can be used for packing beans. It is a mechanical means as distinguished from a hand operation. Its use might affect a material saving over the use of a hand operation. It had no lock means for holding the mold closed. This was unnecessary. It had no stop flange to limit its movement into the can. This was likewise unnecessary.

COMPUTATION.

Quantity of beans packed asparagus

style32,400 cases.

Defendant's business is not confined to the packing of beans asparagus style. In the years 1923-1924 its business included the packing of

1. Beans Asparagus style.
2. Beans (Cut style).

The total number of cases, namely, 32,400, represents 40 per cent of the total tonnage of beans purchased in the years 1923, 1924. The cost per ton of beans in the year 1923 (market value) was \$80.00 and in the year 1924\$80.00—\$100.00

On purchasing its beans, those of the choicest variety are selected for the so-called asparagus style pack. The residue is again graded, cut up and canned and sold wholesale at prices ranging from \$1.00 per dozen for those of an inferior grade to \$1.35 per dozen for those of a better grade. Both the asparagus style beans and the cut style undergo the same treatment common in the

art of canning. In view of the fact that all of the beans during certain stages of treatment are handled in the same manner until finally made ready for the market, it is quite difficult to arrive at a true accounting of the relative costs of handling these two styles of the finished produce.

After the beans were sorted to obtain those for the asparagus pack, use was made of the infringing device whereby these beans could be placed in bunch formation and transferred to cans. This work was conducted by operatives working on a piece basis wherein an operative's tray contains 19 filled cans at the rate of19 per tray
or .01 per can.

The number of cases of beans asparagus style sold by defendant and the names of the persons to whom said beans were sold, together with the amounts received therefor and the dates thereof are as follows:

1923. SHIPMENTS OF ASPARAGUS STYLE STRING BEANS.				
Sept. 4.	Allen & Lewis.....	500 cs.	@ \$2.00	per doz.
Sept. 29.	Amos James Grocery Co.....	75 cs.	@ \$2.00	per doz.
Oct. 25.	Amos James Grocery Co.....	75 cs.	@ \$2.00	per doz.
Oct. 21.	William Cluff Co.	250 cs.	@ \$2.00	per doz.
Sept. 14.	Coast Wholesale Gro. Co.	30 cs.	@ \$2.00	per doz.
Sept. 17.	Coast Wholesale Gro. Co.	100 cs.	@ \$2.00	per doz.
Aug. 18.	Coast Wholesale Gro. Co.	70 cs.	@ \$2.00	per doz.
Aug. 1.	Coast Wholesale Gro. Co.	100 cs.	@ \$2.00	per doz.
Aug. 24.	William Cluff Co.	250 cs.	@ \$2.00	per doz.
Aug. 14.	Calif. Wholesale Gro. Co.	500 cs.	@ \$2.00	per doz.
Aug. 1.	Christopher Merc. Co.	200 cs.	@ \$2.00	per doz.
Oct. 23.	Evan W. Hook & Co.	50 cs.	@ \$2.00	per doz.
Oct. 29.	Hall Luhrs & Co.	100 cs.	@ \$2.00	per doz.
Oct. 24.	Hooper & Jennings	150 cs.	@ \$2.00	per doz.
Aug. 6.	Hooper & Jennings	100 cs.	@ \$2.00	per doz.
Sept. 20.	Hooper & Jennings	20 cs.	@ \$2.00	per doz.

1923. (Continued).

Aug.	7.	Haas Bros.	100 cs.	@	\$2.00	per doz.
Aug.	13.	Haas Bros.	100 cs.	@	\$2.00	per doz.
Aug.	24.	Haas Bros.	100 cs.	@	\$2.00	per doz.
Aug.	24.	Haas Bros.	375 cs.	@	\$2.00	per doz.
Oct.	8.	H. Jevne Co.	750 cs.	@	\$2.00	per doz.
Aug.	14.	H. Jevne Co.	250 cs.	@	\$2.00	per doz.
Oct.	18.	Kockos Bros.	50 cs.	@	\$2.00	per doz.
Oct.	13.	Klauber Wangenheim Co.	25 cs.	@	\$2.00	per doz.
Aug.	8.	Klauber Wangenheim Co.	25 cs.	@	\$2.00	per doz.
Sept.	13.	H. Kellogg & Sons	100 cs.	@	\$2.00	per doz.
Sept.	18.	Keystone Co.	100 cs.	@	\$2.00	per doz.
Aug.	7.	Kern Grocery Co.	20 cs.	@	\$2.00	per doz.
Sept.	8.	Letts-Mellick Gro. Co.	100 cs.	@	\$2.00	per doz.
Aug.	7.	E. Marre & Bro.	50 cs.	@	\$2.00	per doz.
Aug.	25.	E. Marre & Bro.	50 cs.	@	\$2.00	per doz.
Oct.	21.	E. Marre & Bro.	25 cs.	@	\$2.00	per doz.

1923. (Continued).

Sept.	4.	Mason Ehrman Co.	500	cs.	@	\$2.00	per doz.
Aug.	6.	J. H. Newbauer & Co.	75	cs.	@	\$2.00	per doz.
Sept.	6.	Sussman Wormser & Co.	700	cs.	@	\$2.00	per doz.
Sept.	19.	Sussman Wormser & Co.	800	cs.	@	\$2.00	per doz.
Oct.	26.	Sussman Wormser & Co.	212	cs.	@	\$2.00	per doz.
Aug.	7.	Smart & Final Co.	15	cs.	@	\$2.00	per doz.
Sept.	14.	Smart & Final Co.	20	cs.	@	\$2.00	per doz.
Aug.	7.	Scheer & Co.	25	cs.	@	\$2.00	per doz.
Sept.	4.	Sprague Warner & Co.	500	cs.	@	\$2.00	per doz.
Aug.	7.	San Joaquin Gro. Co.	50	cs.	@	\$2.00	per doz.
Aug.	14.	Seeman Bros.	250	cs.	@	\$2.00	per doz.
Aug.	14.	Simpson Ashby Co.	250	cs.	@	\$2.00	per doz.
Sept.	12.	Tillman & Bendel	750	cs.	@	\$2.00	per doz.
Aug.	18.	Tillman & Bendel	100	cs.	@	\$2.00	per doz.
Aug.	6.	Wellman Peck & Co.	100	cs.	@	\$2.00	per doz.
Aug.	18.	Wellman Peck & Co.	100	cs.	@	\$2.00	per doz.

1923. (Continued).

Sept. 7.	Wellman Peck & Co.	200 cs.	@ \$2.00	per doz.
Sept. 12.	Wellman Peck & Co.	150 cs.	@ \$2.00	per doz.
Aug. 14.	R. C. Williams & Co.	425 cs.	@ \$2.00	per doz.
TOTAL NUMBER OF CASES PACKED IN 192310,012 cases.				

1924. SHIPMENTS OF ASPARAGUS STYLE STRING BEANS.

Aug. 1.	Haas Bros.	300 cs.	@ \$2.00	per doz.
Aug. 1.	Sussman Wormser & Co.	300 cs.	@ \$2.00	per doz.
Aug. 9.	Keystone Co.	25 cs.	@ \$2.00	per doz.
Aug. 10.	Tillman & Bendel	100 cs.	@ \$2.00	per doz.
Aug. 12.	H. Jevne Co.....	550 cs.	@ \$2.00	per doz.
Aug. 15.	J. H. Newbauer & Co.	200 cs.	@ \$2.00	per doz.
Aug. 16.	Sussman, Wormser & Co.	100 cs.	@ \$2.00	per doz.
Aug. 16.	Mason Ehrman & Co.	200 cs.	@ \$2.00	per doz.
Aug. 16.	Allen & Lewis	500 cs.	@ \$2.00	per doz.

1924.(Continued).

Aug.	17.	Wellman Peck & Co.	100	cs.	@	\$2.00	per doz.
Aug.	19.	Timman & Bendel	100	cs.	@	\$2.00	per doz.
Aug.	19.	Hooper & Jennings	200	cs.	@	\$2.00	per doz.
Aug.	19.	William Cluff Co.	400	cs.	@	\$2.00	per doz.
Aug.	21.	Wellman Peck & Co.	400	cs.	@	\$2.00	per doz.
Aug.	21.	Haas Bros.	700	cs.	@	\$2.00	per doz.
Aug.	22.	Tillman & Bendel	600	cs.	@	\$2.00	per doz.
Aug.	24.	Hall Luhrs & Co.....	100	cs.	@	\$2.00	per doz.
Aug.	26.	San Joaquin Grocery Co.	100	cs.	@	\$2.00	per doz.
Aug.	27.	Coast Wholesale Grocery Co.	50	cs.	@	\$2.00	per doz.
Aug.	27.	Simpson Ashby Co.	250	cs.	@	\$2.00	per doz.
Aug.	27.	Adrein Loeb Co.	500	cs.	@	\$2.00	per doz.
Aug.	28.	Coast Wholesale Grocery Co.	25	cs.	@	\$2.00	per doz.
Aug.	28.	Haas Bros.	800	cs.	@	\$2.00	per doz.
Aug.	30.	William Cluff Co.	750	cs.	@	\$2.00	per doz.
Aug.	31.	Smith Lynden & Co.	25	cs.	@	\$2.00	per doz.

1924. (Continued).

Sept.	2.	Tillman & Bendel	200 cs.	@	\$2.00	per doz.
Sept.	5.	Hooper & Jennings	200 cs.	@	\$2.00	per doz.
Sept.	5.	Kockos Bros.	75 cs.	@	\$2.00	per doz.
Sept.	5.	Seeman Bros.	1000 cs.	@	\$2.00	per doz.
Sept.	6.	Sussman Wormser & Co.	500 cs.	@	\$2.00	per doz.
Sept.	6.	Wellman Peck & Co.	250 cs.	@	\$2.00	per doz.
Sept.	7.	Keystone Co.	40 cs.	@	\$2.00	per doz.
Sept.	7.	Lindley & Co.	300 cs.	@	\$2.00	per doz.
Sept.	7.	Hall Luhrs & Co.	50 cs.	@	\$2.00	per doz.
Sept.	8.	R. C. Williams & Co.	984 cs.	@	\$2.00	per doz.
Sept.	11.	Kockos Bros.	75 cs.	@	\$2.00	per doz.
Sept.	12.	Spragus Warner & Co.	750 cs.	@	\$2.00	per doz.
Sept.	17.	Mayflower Stores	500 cs.	@	\$2.00	per doz.
Sept.	18.	Haas Bros.	800 cs.	@	\$2.00	per doz.
Sept.	18.	William Cluff Co.	200 cs.	@	\$2.00	per doz.
Sept.	18.	E. Marre & Bro.	75 cs.	@	\$2.00	per doz.

1924. (Continued.)

Sept. 20.	Wellman Peck & Co.....	150 cs.	@	\$2.00	per doz.
Sept. 22.	Smart & Final Co.....	50 cs.	@	\$2.00	per doz.
Sept. 23.	J. H. Newbauer & Co.	50 cs.	@	\$2.00	per doz.
Sept. 24.	Coast Wholesale Gro. Co.	40 cs.	@	\$2.00	per doz.
Sept. 26.	William Cluff Co.	275 cs.	@	\$2.00	per doz.
Sept. 27.	E. Marre & Bro.	40 cs.	@	\$2.00	per doz.
Sept. 30.	Haas Bros.	576 cs.	@	\$2.00	per doz.
Sept. 30.	Allen & Lewis	283 cs.	@	\$2.00	per doz.
Sept. 30.	H. Jevne Co.	446 cs.	@	\$2.00	per doz.
Oct. 4.	Sussman Wormser & Co.	539 cs.	@	\$2.00	per doz.
Oct. 7.	Scheer & Co.	50 cs.	@	\$2.00	per doz.
Oct. 8.	Simpson Ashby Co.	100 cs.	@	\$2.00	per doz.
Oct. 8.	Sprague Warner & Co.	300 cs.	@	\$2.00	per doz.
Oct. 9.	Tillman & Bendel	225 cs.	@	\$2.00	per doz.
Oct. 10.	Keystone Co.	5 cs.	@	\$2.00	per doz.

1924. (Continued.)

Oct.	15.	R. C. Williams & Co.	1000	cs.	@	\$2.00	per doz.
Oct.	16.	Adrein Loeb	200	cs.	@	\$2.00	per doz.
Oct.	16.	H. Jevne Co.	404	cs.	@	\$2.00	per doz.
Oct.	18.	Hooper & Jennings	125	cs.	@	\$2.00	per doz.
Oct.	18.	Smith Lynden & Co.	10	cs.	@	\$2.00	per doz.
Oct.	21.	San Joaquin Grocery Co.	75	cs.	@	\$2.00	per doz.
Oct.	21.	Smart & Final Co.	20	cs.	@	\$2.00	per doz.
Oct.	21.	Allen & Lewis	267	cs.	@	\$2.00	per doz.
Oct.	21.	Coast Wholesale Gro. Co.	130	cs.	@	\$2.00	per doz.
Oct.	22.	J. H. Newbauer & Co.	100	cs.	@	\$2.00	per doz.
Oct.	23.	Mason Ehrman & Co.	150	cs.	@	\$2.00	per doz.
Oct.	25.	Wellman Peck & Co.	150	cs.	@	\$2.00	per doz.
Oct.	25.	William Cluff Co.	125	cs.	@	\$2.00	per doz.
Oct.	27.	Seeman Bros.	1000	cs.	@	\$2.00	per doz.
Oct.	29.	Lindley & Co.	50	cs.	@	\$2.00	per doz.

1924. (Continued.)

Oct.	29.	Christopher Merc. Co.	70 cs.	@	\$2.00	per doz.
Nov.	3.	H. Kelloggs & Sons	210 cs.	@	\$2.00	per doz.
Nov.	5.	Tillman & Bendel	17 cs.	@	\$2.00	per doz.
Nov.	9.	Haas Bros.	324 cs.	@	\$2.00	per doz.
Nov.	18.	Scheer & Co.	20 cs.	@	\$2.00	per doz.
Nov.	19.	Kern Grocery Co.	5 cs.	@	\$2.00	per doz.
Nov.	20.	E. Marre & Bro.	60 cs.	@	\$2.00	per doz.
Dec.	30.	Dodge Sweeney & Co.	1000 cs.	@	\$2.00	per doz.
Dec.	30.	Dodge Sweeney & Co.	322 cs.	@	\$2.00	per doz.
1925.						
Feb.	26.	Dodge Sweeney & Co.	8 cs.	@	\$2.00	per doz.
Mar.	19.	Coast Wholesale Gro. Co.	43 cs.	@	\$2.00	per doz.
TOTAL NUMBER OF CASES PACKED IN 1924			22,388 cases.			

In the years 1925–1926 defendant packed its asparagus style beans by hand and the costs to arrange and deposit the beans within the cans were—1925 per tray of 19 cans, .22, and 1926, per tray of 19 cans, .20.

The average brokerage commission paid on all sales schedule above, packs of 1923–1924 was 3%.

The advantage to defendant incident to use by it in the years 1923–1924 of the infringement (claims 4 and 5) is properly computed on the basis of the savings (costs manual help) as compared with the costs to fill the cans by hand as resorted to by the defendant in the pack (asparagus style) 1925–1926 and on such basis the following is submitted:

1923.

10,012—No of cases.

24—No of cans in case.

40,048

200 24

240,288—total cans.

.01—cost per can.

\$2,402.88—labor cost for 10,012 cases @ .01 per can.

1924.

22,388—cases.

24—No. of cans in 1 case.

89,552

447 76

537,312—total cans.

.01—cost per can.

\$5,373.12—labor cost for 22,388 cases @ .01 per can.

1925 Compared with 1923.

(No. of cans in tray) 19) 240288 —cans.

12646.736—No. of trays.

12646.74 —No. of trays.

.03 —additional cost
by hand.

\$379.4022 additional cost
by hand.

1926 Compared with 1924.

19) 537312 —cans.

28279.576—No of trays.

28279.58 —No. of trays.

.01 —additional cost
by hand.

\$282.7958 additional cost
by hand.

COMPARISON.

Cost 1923—1924

Costs 1925—1926

(By Hand)

1923—\$2,402.88

1925—\$2,782.28

1924— 5,373.12

1926— 5,655.91

\$7,776.00

\$8,438.19

\$8,438.19—1923-24

7,776.00—1925-26

\$662.19—Saving to defendant
incident to infringe-
ment. [118]

State of California,

City and County of San Francisco,—ss.

I. Rancadore makes solemn oath and says: I am the secretary of San Jose Canning Company, defendant. So much of the foregoing statement of account as concerns my own acts and deeds is true to the best of my own knowledge: and so much thereof as concerns the acts or deeds of any other person or persons I believe to be true.

I. RANCADORE.

Sworn to before me this 14th day of October, 1926.

[Seal]

C. B. SESSIONS,

Notary Public, in and for the City and County of San Francisco, State of California.

Recd. copy hereof 10/14/26.

PRESTON & DUNCAN.

ROBERT E. HATCH.

[Endorsed]: Filed June 8th, 1928.

(Title of Court and Cause.)

NOTICE OF MOTION FOR FURTHER ACCOUNTING.

Before HARRY M. WRIGHT, Special Master.
To the Defendant Above Named and to Its Attorneys:

You and each of you will please take notice that the plaintiff above named will, on Monday, the 30th

day of January, 1928, at the hour of 10 o'clock, A. M., or as soon thereafter as counsel can be heard, at the office of Harry M. Wright, Esquire, Special Master herein, 68 Post Street, San Francisco, California, move said Special Master for an order requiring the defendant to make out and deliver to said Special Master, a further sworn statement of account in debtor and creditor form showing the profits made by defendant from the canning and sale of string beans, packed asparagus style by the use of the device or devices set forth in the pleadings on file herein.

Said Motion will be based upon all of the records, papers and files herein and this notice of motion.

ROBERT DUNCAN,
CLARENCE A. LINN,
Attorneys for Plaintiff.

Receipt of a copy of the within notice of motion for further act, admitted this 11th day of January, 1928.

A. SCHAPP,
Attorney for San Jose Canning Co.

[Endorsed]: Filed Jun. 8, 1928.

(Title of Court and Cause.)

NOTICE OF MOTION TO AMEND THE
ORDER OF THE SPECIAL MASTER FOR
AN ACCOUNTING IN DEBTOR AND
CREDITOR FORM, DATED SEPTEMBER
1, 1926.

To the Plaintiff Above Named and to the Attorneys:

You and each of you will please take notice that the defendant above named will, on Monday, the 30th day of January, 1928, at the hour of 10:00 o'clock A. M. or as soon thereafter as counsel can be heard, at the office of Harry M. Wright, Esq., Special Master herein, 68 Post Street, San Francisco, Calif., move said Special Master for an order that the said Master's order of September 1st, 1926, requiring the defendant to make a sworn statement of account in debtor and creditor form of the profits made by the use of the infringing mold be amended in the following respects:

Page 1 of said order, line 8 of the paragraph beginning with "NOW, THEREFORE," after "packed asparagus style" insert by means of the infringing mold.

Same page, under (1), after "asparagus style" insert by means of the infringing mold and cancel "and the amount of money paid therefor."

Pages 1 and 2, cancel paragraph under (4) and substitute: Cost of filling the cans by means of the infringing mold.

Page 2, cancel paragraphs under (5), (6) and (7) and substitute: (5) Cost of filling the cans by means of a standard of comparison.

This motion will be based upon all the records, papers, and files herein, and this notice of motion, and upon the ground that under the law profits in a case of infringement where the infringement consists in the use of an infringed article only are to be computed by a comparison of the advantage gained by the use of the infringing article over that gained by the use of the next best noninfringing article at the disposal of the defendant.

A. SCHAPP,
Attorney for Defendant.

Receipt of the within notice is hereby admitted this 24th day of January, 1928.

ROBERT DUNCAN,
C. A. LINN,
Plaintiff's Attorneys.

[Endorsed]: Filed June 8, 1928.

(Title of Court and Cause.)

MASTER'S OPINION AND ORDER.

Equity Rule 63, requiring parties accounting before a Master to bring in their respective accounts

in the form of debtor and creditor, undoubtedly originated in and has its most obvious and ready application to ordinary accounts such as those of a partner or trustee, or the like, where a set of books would show money items on each side of the account. The practice prescribed obviously makes it possible for the complainant, upon receiving the discovery embodied in the Rule, to accept certain items and narrow the hearing before the Master to items that are disputed either in fact or in law. Accountings of profits in patent cases differ widely from the situation presented in ordinary accounts, as anyone experienced in such accountings will realize. Books of account in patent accountings may serve as sources of material, but rarely contain the ultimate figures of debit and credit desired, making necessary the use of estimates. The machinery of Rule 63, therefore, labors considerably in the effort to grind out the results desired, but since discovery is of right and the fundamental principle of narrowing the issues at the hearing is here equally pertinent, courts of equity in this country have usually applied Rule 63 to patent accountings and it is the practice in this District. The very broad powers of the Master under Rule 62 would, in my opinion, give him power to require the filing of the statement under Rule 63, even if the latter did not exist. Though it is customary here for the Master to order the filing of a debtor and creditor statement as the first step in the accounting, the practice adapted to settle the issues is quite unsettled. It must not be forgotten, also, that while the Master

has broad powers of regulation, he is necessarily ignorant of the requirements of the particular situation and it, therefore, falls in the first instance upon the plaintiff's counsel to draft the Master's order requiring the filing of the account under Rule 63, and to insert therein the particular details in the nature of discovery, which, in counsel's opinion are best adapted to ascertain the profits due. Equally, it would seem, is the burden then cast upon counsel for the accounting defendant either to obey the order as given or, by timely motion before the Master, to attempt a correction of the Master's order. I see no reason furthermore why, in this described program of settling the issues, there may not be occasions for taking evidence just as in equity evidence may be taken in a preliminary hearing in support of a plea. For example, it seems to me that it would be a correct and desirable practice in accountings before the Master that there be a preliminary hearing that would be proper in particular cases to determine the standard of comparison to be applied in the particular case. An experience of eighteen years as a Master of this court has not determined any settled practice in this regard, and these observations are called forth solely by the facts of the present case with the idea that they should be generally applicable.

The facts of the present situation are as follows:

On June 26, 1925, the Master signed an order for a statement under Rule 63 with certain detailed requirements under seven headings deemed by plaintiff necessary to determine the profits made by the

defendant from canning string beans packed asparagus style. Thereupon, as is not unusual, the matter rested in the Master's files. There is no proof in my files that said order was served, nor was the original returned. Meanwhile an appeal had been taken from the interlocutory decree, and on January 18, 1926, 10 Federal 2d, page 100, the Circuit Court of Appeals affirmed the decree below as to infringement of claims covering the device, but reversed it as to claims covering the method of packing, stating that this method was nothing more than the obviously necessary manner of operating the mechanism.

On September 1, 1926, there was presented to me by plaintiff and signed a second order for filing of an account under Rule 63 substantially similar to the one issued in 1925.

On October 14, 1926, there was filed with me defendant's verified statement of account. This statement is preceded by a long discussion setting forth the modification of the decree by the Court of Appeals and an argument on the law largely directed to development of defendant's view that the original Master's order was too broad. The Master does not read documents filed with him, unless counsel moves them to his attention.

Following this statement of the law is an account giving some of the discovery ordered by the Master's order and disregarding, to a large extent, the balance of the order, and concluding with a statement of the profits on the theory that it was open to defendant to use as a standard of comparison the

costs of packing string beans asparagus style by hand. Obviously the practice followed by the defendant of disobeying the Master's order and making discovery according to his own notions of what the order should have been was unsound, and, if it were thought necessary, would expose the defendant to punishment for contempt.

Defendant's counsel should have moved for a modification of the order.

Following this filing of the account, plaintiff noticed a motion for the 30th of January, 1928, for a further sworn statement of account under Rule 63, and on the date named, I was attended by Clarence A. Linn, Esquire, counsel for plaintiff, in support of the motion, and by A. Schapp, Esquire, for defendant. At the same time, defendant presented a motion for modification of the order, the purport of which was to confine the costs to the use of the infringing mold or device and to introduce into the details required an item of cost of filling the cans by defendant's selected standard of comparison. No evidence was offered or taken, and the only light I have on the situation is the argument of counsel, aided to some extent by the disclosure made in the account filed.

From this account, as well as from the argument, it would appear that the first issue to be decided is that of the proper standard of comparison. From the account, page 5 and following, I gathered that defendant was a licensee of the plaintiff under the patent in suit, paying therefor a yearly royalty of five hundred (\$500) dollars. A renewal of the li-

cense for 1923 was not accepted by the defendant, who, during that year and 1924 used the device decreed to be an infringement.

In 1925 and 1926, as stated in this account, page 19, the defendant packed its asparagus style beans by hand. Its account of profits is founded on the difference in cost between the costs of filling in 1923 and 1924 compared with the greater cost of hand filling in 1925 and 1926, showing a saving by the infringement of \$662.19.

The complainant's contention, on the other hand, is that the packing of string beans whole, lengthwise in the can, in the manner of asparagus stalks was not known in the art until plaintiff's device, two semi-circular molds with certain accessories, which bunch the beans and facilitate their insertion into the cans, created that particular style of packing; that prior thereto, string beans were not packed asparagus style by hand, but were packed cut up into pieces. Plaintiff's contention, accordingly, is that the selected standard of hand packing is not applicable under the law and that plaintiff is entitled to the entire profits of defendant for beans packed by the infringing device in the asparagus style originated by plaintiff, there being no hand operation for such packing then known.

It is, of course, settled law that a device or method not known at the time of the infringement is not available as a standard of comparison, 277, Federal, 177; Walker, Section 725. If plaintiff is correct on the facts, his claim that he is entitled to all the profits of beans packed asparagus style, with-

out reference to any standard of comparison, would seem on my present understanding to be correct.

Considering the delay and the failure of defendant to earlier move in modification of the order, I might well grant a motion to comply with the order as given. The unsettlement of the practice seems, however, to suggest that before defendant is required to make a further accounting, a more lenient view should prevail and that we should now proceed as we should have proceeded if defendant had moved in modification of the order as soon as it was given.

The point upon which light is needed by evidence is as to state of the art in the years 1923 and 1924, with a view of determining the proper standard of comparison to be applied. The burden of proving the standard of comparison, whether it be the hand operation of some other means, rests on defendant, and a hearing should be had at which defendant, as the moving party, will present evidence, the plaintiff to be heard in reply. If defendant does not convince the Master that hand operation, or some other standard of comparison, was open to defendant during the period of infringement, defendant must be prepared within a brief time thereafter to file a further statement of account of its entire profits in packing beans asparagus style as prayed for by plaintiff.

I will appoint Monday, February 27, 1928, at 10 o'clock A. M., at my office, Room 706 at 68 Post Street, San Francisco, California, as the time and

place for hearing evidence as to the standard of comparison to be used.

Dated January 31, 1928.

H. M. WRIGHT,
Special Master.

(Title of Court and Cause.)

TRANSCRIPT OF PROCEEDINGS BEFORE
SPECIAL MASTER.

Monday, February 27, 1928.

Counsel Appearing:

For Plaintiff: CLARENCE A. LINN, Esq.

For Defendant: R. M. J. ARMSTRONG, Esq.
A. SCHAPP, Esq.

Mr. ARMSTRONG.—I think we will put on Mr. Rancadore, first; I am putting him on without prejudice, and except to the ruling of the Master that the burden is on the defendant to show that there were other methods that he might have used, for the purpose of comparison, and I would like the ruling of the Master upon that.

The MASTER.—The objection is overruled and an exception may be noted.

TESTIMONY OF I. RANCADORE, FOR
DEFENDANT.

I. RANCADORE, called for the defendant,
sworn.

Mr. ARMSTRONG.—Q. Mr. Rancadore, you are an officer of the defendant, San Jose Canning Company?

(Testimony of I. Rancadore.)

A. Yes.

Q. What is your position in that company?

A. Secretary, treasurer, and general manager.

Q. How long have you held that position?

A. The position of general manager I have held since the company was organized. I was president and general manager at the beginning.

Q. When was the company organized?

A. In 1919.

Q. You were then general manager? A. Yes.

Q. And have been general manager ever since?

A. Yes.

Q. When did you first become an officer of the company?

A. 1919, when the company was organized.

Q. At that time you were president? A. Yes.

Q. And afterward became secretary-treasurer and someone else became president then?

A. I turned it over to my father; my father is president now.

Q. Do you remember the packing season of 1922?

A. Yes.

Q. In 1922 did you experiment with packing beans in bunch form, so-called asparagus style?

A. Yes.

Q. Will you explain to the Court just what you did at that time, and, if possible, about the time in 1922 when you did it?

A. It was in the latter part of July, that is, when we got started packing string beans. I worked under a license from Anthony Greco.

(Testimony of I. Rancadore.)

Q. In 1922?

A. In 1922, and as soon as we got started packing string beans, I was wondering if something could be accomplished by hand without using any mold of any kind, so I told my assistant superintendent, Mr. Cusimano, to try and get up a form so that it would hold enough beans in there to fit into a can, and we tried several forms, and we finally got enough beans in this form to fit the No. cans. This is the kind that we generally use in packing our string beans, except these are a little higher.

Q. That is the form, except the uprights were a little higher?

A. They were higher before. So we tried it and about half a dozen cans were packed, and we saw we could fit them exactly as the mold did, make a very good pack; more beans go into a can with that than with a mold, due to the fact that the mold is a little bit narrower than the can, itself. In bunch form, we could put in as much beans as the cans will hold. Naturally, if the girls put in too many beans, they could pull some out, half a dozen or so.

Q. That is, with the mold?

A. No, with this, here.

Q. With a mold it sometimes went under the required number of beans?

A. Yes, depending on the canner; if she did not put enough beans into the mold, naturally the can would be slack, and there wouldn't be enough beans

(Testimony of I. Rancadore.)

in there to make a good pack, and when you open up a can the beans, instead of standing up in a bunch, will fall apart.

Q. At the time that you made this experiment, did you make any attempt to figure what the difference in cost might be? A. No, we did not.

Q. Now, you spoke of a license from the Grecos. From that I understand you mean the owners of the patent that had been issued prior to that time to Mr. Anthony Greco. That was the Greco you mean? A. Yes, the Greco patent.

Mr. ARMSTRONG.—It will be stipulated, I think, that that is the patent in controversy?

Mr. LINN.—Yes.

Mr. ARMSTRONG.—Q. At that time did you go out and solicit the use of that patent?

A. Why, yes, I did. I was told, in fact, that both Anthony Greco and Victor Greco claimed that he was the owner of the patent.

Q. Did they come to you or you go to them?

A. I think I went to them. I went to them, and Anthony Green claimed that he was the owner of the patent, and, in fact, at that time the patent was in dispute, I believe, they had a lawsuit to prove the ownership of the patent at that time, and I personally was convinced through the advice of the attorney of Anthony Greco that Anthony Greco was the owner of the patent, and, if anything, I should do business with Anthony Greco, and not with Victor Greco.

(Testimony of I. Rancadore.)

Q. Well, was there any particular reason why you at that time experimented with hand packing?

A. That was in 1922. I had a license for that year.

Q. I am talking about 1922, when you had the license, was there some conversation about your lack of right, with the Grecos—your Honor understands that they were the assignors of the patent.

The MASTER.—I understand.

Mr. ARMSTRONG. — Q. (Continuing.) Was there some conversation with either of them or both of them as to your lack of right to pack beans in bunch form, or asparagus form? A. Yes.

Q. Can you give that conversation?

A. Mr. Victor Greco threatened that he would stop us whether we packed string beans, or not, inasmuch as he had a patent on that particular pack, and nobody could pack string beans, no matter how they put them in the can, that he had a patent that covered that method.

Q. Was that one of the things that moved you to take this license?

A. Naturally. If I knew at that time I had the right to pack them by hand I would never negotiate with anybody when I could do it without taking any license.

Q. These threats came at the beginning of the pack? A. At the beginning of the pack.

Q. Just when the pack is about to start?

A. Even though I had a license from Victor

(Testimony of I. Rancadore.)

Greco, Anthony started a restraining order against us that year.

Q. You had some litigation; a suit was filed?

A. Yes.

Q. In the federal court? A. Yes.

Mr. ARMSTRONG.—If the Court please, might I ask at this time, although I tried this case, that is the first I have known of it—might I ask permission, if it is found necessary, to offer all of the pleadings, and other files in that matter?

Mr. LINN.—I think it might be assumed that in 1922 there was litigation between the Greco brothers, over the ownership of the patent now in dispute. The San Jose Canning Company was operating under a license from Anthony Greco at that time, and Victor Greco claimed an interest in the patent, or claimed the ownership, and instituted a suit against Anthony Greco and Rancadore, and I believe obtained a sort of preliminary restraining order, which was subsequently dissolved, because Greco Brothers adjusted their difficulties, and the patent was then assigned to Louis Oneal.

The MASTER.—Does that stipulation suit you, Mr. Armstrong?

Mr. ARMSTRONG.—I think not. I think it will become necessary later on to introduce the file. I would like to examine the file later, and I simply ask permission to leave that open. I think Mr. Linn and I can stipulate. I am pretty good at stipulating.

(Testimony of I. Rancadore.)

Q. Mr. Rancadore, how much did you pay for the license that first year? A. \$500.

Q. That was for the year 1922?

A. The year 1922.

Q. For the year 1923 did you take a license?

A. In 1923 we finally got together with Louis Oneal and Anthony Greco, and Victor Greco, and myself, in Louis Oneal's office, and, in fact, a contract was drawn then, for the same privilege, to pack asparagus style of string beans, at the price of \$500 a year. When Mr. Oneal had the papers all ready, or the contract ready, he called me up and I went up and got it, and had the president and secretary sign it, and then I went back to Mr. Oneal's office again, because he was the trustee, he told me that before he signed it, he wanted me to see Mr. Victor Greco; he said that Mr. Greco wanted to see me before he signed the contract. So at that time I had a patent pending at Washington for a mold, which was in dispute later, and was waiting for a patent on it, and the patent did not arrive until about August, 1923.

Q. When does the pack usually start?

A. The pack starts in July, and I had applied for a patent, I think it was somewhere in the year before, if I remember right, you have the record there, I don't remember exactly, but it was along there, so when I got to Mr. Greco's office in the cannery Mr. Greco told me that he would absolutely not agree to the signing of the papers by Mr. Oneal unless I assigned all of my right, title, and interest in the patent which was then pending.

Mr. ARMSTRONG.—This can be stipulated, I think, Mr. Linn. Rancadore's application was filed April 26, 1922, and the patent was issued August 14, 1923.

Mr. LINN.—I was about to interrupt to say I did not see the materiality of the testimony. What we are driving at this morning, as I understand it, is the art as it stood at the time of the infringement.

Mr. ARMSTRONG.—If the Master rules it is relevant, and is to be taken up later, it enters into the element of damages, the nature of the license, there would have to be another hearing. Would your Honor have it that way?

The MASTER.—Yes, I do not think it is material at this time.

Mr. ARMSTRONG.—The question of license, except so far as it necessarily went into the matter of having started some comparative basis, may be deferred until another hearing to be held at the call of the Master?

The MASTER.—I call the parties' attention to the fact that if I recall this case, under the order of reference, I am to find nothing but profits. The usual order is damages and profits; you take whichever is the larger.

Mr. ARMSTRONG.—That may have been the order. Under your Honor's order, which I only read Saturday, I take it at this time we are simply

(Testimony of I. Rancadore.)

to establish whether there was any foundation for any basis of comparison in the hand pack.

The MASTER.—Yes.

Mr. ARMSTRONG.—We will let that stand, then.

Mr. LINN.—Yes.

Mr. ARMSTRONG.—Q. Mr. Rancadore, you did not take a license in 1923? A. No.

Q. Nor in 1924? A. No.

Q. During those two years, did you use any molds? A. We used my mold.

Q. Your patent having previously been granted? A. Yes.

Q. When you say “my mold,” you mean the mold that was offered in evidence in this case which is now pending? A. Yes.

Q. Then in 1925 what did you do?

A. As soon as we found out we could pack asparagus style string beans by any other method except the method of the mold similar to the Greco mold, we immediately went back to the hand pack, which we have continued ever since.

Q. You started that in the season of 1925?

A. Yes.

Q. While the suit was still pending?

A. Yes, it was pending, but the decision was already given, and at that time we took an appeal, and the appellate court decided that the claim—

The MASTER.—We know all about that.

Mr. ARMSTRONG.—Q. That suit was pending?

A. Yes.

(Testimony of I. Rancadore.)

Q. You went back to your form of mold that you experimented with in 1922?

A. Yes, this is the one we have been using.

Q. Will you explain the difference between the two molds?

A. We saw that when you cut the beans this way, the beans do not rest on anything here, they are kind of limber, you do not make a clean cut on the bottom, so we extended the wood part here so that all the beans rested on it, and when you cut you would make a clean cut.

Q. The beans, before they had been put in the mold, had been blanched? A. Yes.

Q. That was the mold that you had in 1923?

A. 1925, 1926, and 1927.

Q. It was upon the use of that mold in those years that you based the statement which you have filed with this Court, and which you swore to on the 14th of October, 1926, as to comparative cost?

A. Yes.

Mr. ARMSTRONG.—I wish to introduce in evidence the shorter one of these two models as Defendant's Exhibit 1, and the longer one as Defendant's Exhibit 2.

The MASTER.—They will be so received and marked.

(The models were marked Defendant's Exhibits 1 and 2.)

Mr. ARMSTRONG.—That is all.

(Testimony of I. Rancadore.)

Cross-examination.

Mr. LINN.—Q. Mr. Rancadore, you first packed under the Greco patent in the year 1922: Is that correct? A. Yes.

Q. That was under a license by Anthony Greco?
A. Yes.

Q. That was the first time you had ever packed string beans in the so-called asparagus style?

A. I could have done it before that.

Q. But you did not do it? A. I did not do it.

Q. You had never done it before?

A. No, on account of the threat that I could not do it and they would sue us.

Q. Did you have any talk with Victor Greco prior to the year 1922, at all, with reference to the packing of string beans?

A. I do not recall it if I did.

Q. When did you enter the business of packing string beans? A. In 1919.

Q. In 1919, 1920, and 1921 you packed string beans? A. In 1921 we did not pack.

Q. You did not pack, at all, in 1921?

A. We did not pack, at all, in 1921, no.

Q. In 1919 and 1920 you packed string beans?

A. Yes.

Q. Describe the method of packing those string beans in those two years. A. Cut string beans.

Q. What do you mean by that, describe the method?

A. The beans were taken when they came in from

(Testimony of I. Rancadore.)

the ranches and the women were stripping them off and tipping the ends, and then they are cut in an inch or an inch and a half lengths, and put in the can after they are blanched. We packed in 1919 whole string beans in cans.

Q. You did?

A. Yes, not asparagus style, but whole string beans.

Q. Whole string beans?

A. Yes, put them in the cans any old way, not packed asparagus style.

Q. But put in the can any way? A. Yes.

Q. A smaller bean, was it?

A. Yes, and big beans, of a fancy quality.

Q. Did you keep any books to show comparison of the cost between packing them that way and packing them cut, or packing them with the Greco mold, as you did in 1923?

A. No, I did not, I did not keep any record.

Mr. ARMSTRONG.—Q. Have you any record of the year when you packed them whole?

A. You mean the first year?

Q. I mean when you packed them whole in cans. Have you any record of what the costs were?

A. I don't remember what we did pay, but I think it was some 3 cents a tray, or 4 cents a tray.

Q. A tray consists of what? A. Of 19 cans.

Mr. LINN.—Q. Have you any comparison that would show the difference in the cost of packing them whole in 1922 and packing them whole under the Greco mold, as you did in 1923?

(Testimony of I. Rancadore.)

A. Well, for the asparagus style pack we paid 20 cents a tray, packing them in asparagus style; cutting beans, that is very easy work, and it is only 11½ or 2 cents a tray.

Q. Have you any record to show what you paid for packing them whole in 1920?

A. Well, the whole beans is altogether different than the asparagus style.

Q. I mean have you got any record that would show? A. No record.

Q. No record of any kind? A. Yes.

Mr. ARMSTRONG.—Q. Wouldn't the books show the cost of that that year?

A. We used a workmen's card, that is all we generally did, for the cost, and after one or two years that was destroyed.

Mr. LINN.—Q. You knew that the Grecos were canning beans asparagus style in 1919, did you not?

A. Yes.

Q. And you knew it in 1920? A. Yes.

Q. You did not pack any in 1921? A. No.

Mr. ARMSTRONG.—I object to the question, because anybody could pack asparagus style beans in 1919.

Mr. LINN.—This is just preliminary.

Mr. ARMSTRONG.—It may be preliminary, if you are going to connect it up; otherwise, my objection goes. Could we have a ruling on it?

The MASTER.—Read the question.

(The record was here read by the reporter.)

Mr. ARMSTRONG.—I will change my objection

(Testimony of I. Rancadore.)

to a motion to strike out; it is not within the purview of this trial, here.

Mr. LINN.—It is just preliminary, as showing the state of the art.

The MASTER.—I will overrule the motion.

Mr. ARMSTRONG.—Exception.

Mr. LINN.—Q. Mr. Rancadore, did you know of anyone who canned beans asparagus style without the use of the Greco mold prior to the year 1923?

Mr. ARMSTRONG.—I object to that as irrelevant and immaterial.

The MASTER.—Overruled.

Mr. ARMSTRONG.—Exception.

A. I don't know what the other canners were doing; probably somebody was packing asparagus style string beans; I understood that somebody in the east were canning asparagus style string beans.

Mr. LINN.—Q. Who did you understand were packing asparagus style string beans in the east?

A. I don't know who the canners were, but there was some rumor that other people were putting it out. I don't know that as a fact.

Q. You were in the canning business rather extensively?

A. Not extensively, a small plant.

Q. Don't you consider market conditions and go into them, necessarily?

A. Market conditions, yes.

Q. You know what product was being marketed at that time in the United States?

(Testimony of I. Rancadore.)

A. I did not.

Q. You don't know, then, of anyone who was canning beans asparagus style without the use of the Greco mold in the year 1923?

A. I don't know for a fact, no.

Q. In the year 1922, the season of 1922, did you pack string beans asparagus style? A. Yes.

Q. With the use of the Greco mold?

A. I packed under a license from Anthony Greco.

Q. Give the date at which you obtained that license from Anthony Greco, or entered into negotiations with Anthony Greco for that license in 1922.

Mr. ARMSTRONG.—Which one do you want, the date he entered into negotiations?

Mr. LINN.—The date that he entered into negotiations.

A. I don't remember the exact date, I believe it was in the spring of 1922, long before the packing of string beans.

Q. You entered into negotiations with Anthony Greco for a license under his mold? A. Yes.

Q. That was before the crop of string beans had been harvested? A. Yes.

Q. When did you obtain that license?

A. That I don't remember the date of; I may have a record some place. It was before the packing of string beans.

Mr. ARMSTRONG.—Might I suggest that the plaintiff knows the date as well as the defendant

(Testimony of I. Rancadore.)

does, and he can probably give it, and we may stipulate as to it to save time.

Mr. ANTHONY GRECO.—It was in the spring of 1922.

Mr. LINN.—Q. Then you had a license under the Anthony Greco patent prior to the harvesting of the string beans in 1922? A. Yes.

Q. You did not start your experiment using Defendant's Exhibit No. 1, until after you had the assignment of the Anthony Greco patent?

A. What do you mean by "assignment"?

Q. The license.

A. It was during that pack, as soon as we started the pack.

Q. As soon as you started packing you started experimenting with this device or mold which is in evidence as Defendant's Exhibit No. 1?

A. Yes.

Q. At that time you were operating under the Greco license, were you not?

A. I was, but I did not expect to use this. I wanted to satisfy myself whether it could be done by hand, or not.

Mr. ARMSTRONG.—Q. Did you satisfy yourself?

A. Yes, absolutely.

Mr. LINN.—Q. Did you ever use that mold, Defendant's Exhibit No. 1, at all, in the year 1922?

A. Just about half a dozen cans.

Q. For about six cans? A. Yes.

Q. You discarded it then?

(Testimony of I. Rancadore.)

A. Yes, I did not intend to use it because I had a license to pack.

Q. At the same time you were experimenting on another mold?

A. I was experimenting to see if it could be done by hand.

Q. At the same time you were experimenting on another mold which experiments culminated in an application for a patent for a mold which is the infringing mold in this case: Is that true?

A. Yes. I did not pack with the mold of Anthony Greco, at all; I used my own mold during that year.

Q. During that year?

A. In 1922, I did not use his mold, at all although I had a license; I used my own mold, because I thought it worked easier than the other one.

Q. In 1922, you operated under a license from Anthony Greco? A. Of \$500, yes.

Q. And you used a mold which you, yourself, or someone in your employ, prepared, and which was subsequently offered for patent? A. Yes.

Mr. ARMSTRONG.—Q. And patent issued?

A. And patent issued.

Mr. LINN.—Q. And that was the mold which was the infringing device referred to in this case?

A. Yes.

Q. When, in the year 1922, did you use this device? A. In July, 1922.

Q. Defendant's Exhibit No. 1 in evidence.

A. In July, 1922.

(Testimony of I. Rancadore.)

Q. In July, 1922? A. Yes.

Q. You discarded it after packing about six cans? A. Yes.

Q. At that time did you in any way make any comparison of the cost of packing string beans with this mold Defendant's Exhibit No. 1, with the Greco device?

A. I did not, because it was not necessary.

Q. You did not? A. No.

Q. In 1922, or 1923, did you use either of the devices No. 1 or No. 2 in evidence?

A. No, I did not.

Q. In 1924 did you use either of the devices in evidence? A. Yes, I did.

Q. Which one? A. No. 2.

Q. You used No. 2? A. Yes.

Q. That is in the year 1924? A. 1925.

The MASTER.—How about 1924?

A. In 1924 I was working under my own mold; at the time the suit was still pending, I did not want to use this, on account of the threat of being sued, anyway, whether I packed them by hand, or not, so I thought I had better stay with my own mold, because of having a patent on it.

The MASTER.—Q. You began to use No. 2 there in 1925?

A. In 1925.

Mr. LINN.—Q. You did not experiment any further with mold No. 1? A. No.

Q. After 1922? A. No.

Q. You again took up the matter of experiment-

(Testimony of I. Rancadore.)

ing with the mold or device other than the Greco patent in the year 1925?

A. In 1925 we used the hand method.

Q. In the year 1925 you developed the mold in evidence as Exhibit No. 2?

A. I would not call that a mold, I would call that more a form to hold string beans.

Mr. ARMSTRONG.—He did not develop it.

A. It is not developed, it is the same thing, only I changed the size of the plates.

Mr. LINN.—Q. It is the same thing as the other, only different?

A. It is the same, only I changed the size of the plates.

Q. You found that No. 1 was impracticable?

A. No, I did not say it was impracticable—

Q. Just wait a minute. You found No. 1 was impracticable because the beans, you were not able to shear off the ends of the beans—

A. The bottom layer, that is all.

Q. (Continuing.) As well as could be done under the Greco patent?

A. No. I did not say any such thing.

Q. I say you found that to be the fact.

A. The Greco patent is the same way, there is nothing to hold them in the Greco patent, unless you put it over a block; there is nothing to hold the string beans in there, because the Greco patent is just a cylinder, without anything on the bottom to hold the string beans, when you cut them, unless you put it over a block.

(Testimony of I. Rancadore.)

Mr. ARMSTRONG.—Q. As far as cutting is concerned, it is better than the Greco patent?

A. Yes, it is better, because there is something to rest on.

Mr. LINN.—Q. You found No. 1, though, impracticable?

A. No; I could use that as well as the other.

Q. You could use that as well as the other?

A. Yes, absolutely.

Q. You found no advantage in the extension of the block beyond the upright in Exhibit No. 2?

A. No material advantage at all; you could do it just as well, but it is easier to do it.

Q. It makes a better pack than No. 2?

A. It has nothing to do with the pack; the cutting of the ends of the string beans has nothing to do with the pack.

Q. Doesn't it improve the appearance?

A. No.

Q. As to Exhibit No. 1 in evidence, the difficulty with that was that the uprights are not long enough? A. No, it is just the same as the other.

Q. When you shear off the ends of the beans, the bottom layer of beans, or the beans on the bottom, did not cut off as sharp as you think they should?

A. They do; occasionally, if the girl does not know how to handle the knife she would chew off the bottom layer on account of not having a bottom block, but you can make as clean a cut as with the other if you are careful, only it makes it easier for the girls to handle.

(Testimony of I. Rancadore.)

Q. But it insures a better product?

A. Not a better product, no.

Q. It does insure a better product, doesn't it?

A. It does not.

Q. The product is just as good with the bean broken off, the point of it?

A. I did not say broken off, at all. These forms have nothing to do with the product. If the product is good when you put them in a can it is good, but if they are bad this does not improve it.

Q. The beans are just as good, no matter which way it is? A. Yes.

Q. But your product is more marketable if there is a clean cut in the can?

A. Naturally, they look better.

Q. They look better, the product is marketable to a greater extent?

A. They look better, of course.

Q. And they sell better?

A. That is the reason we had this long, in order to be sure that all of the beans was cut clean.

Q. In order to insure a produce that would be more marketable you developed Device No. 2 in evidence?

A. This could have been done in the same way I did with the first form in 1922.

Q. But it was not done?

A. Because I did not intend to use it; this was only for my own satisfaction, to see whether we could pack them, or not.

Q. Necessity developed No. 2 in 1925?

(Testimony of I. Rancadore.)

Mr. ARMSTRONG.—That calls for a conclusion.

The MASTER.—I think it is very clear. It is a conclusion.

Mr. LINN.—Q. You have never packed beans, then, at any time, except in the year 1920, exclusively by hand, without the use of any device?

A. What do you mean by 1920?

Q. You packed string beans whole?

A. In 1919.

Q. In 1919, was it?

A. 1920 and 1919, two years we packed without packing asparagus style; in 1921 we did not pack, at all.

Q. In 1920 you packed beans cut as you have described, and also packed some whole? A. Yes.

Q. Without the use of any device, at all?

A. We did not pack them asparagus style.

Q. But they were not packed asparagus style?

A. No.

Q. When you refer to “asparagus style” you mean in bunch form, standing erect in the can?

A. Yes. The only reason why I did not do it was because I did not want to get into a lawsuit on account of Greco claiming nobody could pack asparagus style string beans without getting permission from him, on account of his holding a patent.

Q. Then until the year 1925, with the exception of the six cans in the year 1922, you did not can string beans whole, or asparagus style, without the use of the Greco mold?

(Testimony of I. Rancadore.)

A. I never did use the Greco mold.

Q. Or your infringing device?

A. Yes, that is commercially. I packed in 1923, and 1924, I packed some whole to see that the work could be done all right, but I did not go into it extensively.

Q. In 1923 and 1924 you used No. 2?

A. I used No. 2, that is, not commercially, just to satisfy myself whether or not it could be done.

Q. And you satisfied yourself on No. 1 in 1922?

A. Yes, I wanted to get on it in order to see that it packed just as good as the other.

Q. With this device No. 2, string beans are placed in it by hand?

A. By hand, yes, the same as you do on the mold.

Q. The same as you do on the Greco mold?

A. Yes.

Q. You then shear off the protruding ends with a knife? A. Yes.

Q. The same as you do in the Greco mold?

A. Yes.

Q. Then you take the beans up by hand?

A. Yes.

Q. Out of the mold? A. Yes.

Q. Or out of this device? A. Yes.

Q. And insert them in the can? A. Yes.

Q. That is the way it is done?

A. Just the same as it is done in Greco, but of course you don't take it by hand by the Greco mold.

Q. No. 2 was never used commercially—

A. (Intg.) Until 1925.

(Testimony of I. Rancadore.)

Q. How many cans did you can with that mold in 1923 or 1924?

A. I don't remember, just a few cans, to see that it could be done all right, and we could pack them just as good as the other.

Q. Does it pack just as good as the other?

A. Yes.

Q. Have you got any samples?

A. I can get some very quickly.

Mr. LINN.—I suppose we might introduce in evidence cans of the different packs?

Mr. ARMSTRONG.—We will be very glad to submit them to the Master.

The MASTER.—What is the purpose of this mold No. 2?

A. It is to hold enough beans in the form to fit into a No. 2 can.

Q. It has two purposes, then, it is to measure the beans for the purpose of filling a No. 2 can?

A. Yes.

Q. And to cut off the ends?

A. Cut off the ends.

Q. That is, you cut off one end, don't you?

A. You cut off both ends. The girls last year found it easier by cutting off one end and putting it in the can and then cutting the other end after they put it in the can; they do it both ways, whichever is the easiest way they do.

Mr. LINN.—That is all.

Mr. ARMSTRONG.—I don't know whether it is necessary to bring out the fact, because it is self-

(Testimony of I. Rancadore.)

evident to the Court, that the looseness of the bars or uprights on the No. 1 mold, and perhaps on the No. 2, is simply due to shrinkage.

The MASTER.—Is this the identical mold, No. 1, that you used at the time?

A. It is the original mold.

Q. And those galvanized tacks were the ones that were originally there?

A. Yes. Of course, the board got smaller on account of shrinkage, and they got rather loose.

Mr. LINN.—Q. Is there anyone that you can name that assisted you in doing this?

A. Yes, two of them.

Q. Who were they?

A. One of them is Mr. Filice, and the other Mr. Cusimano.

Mr. ARMSTRONG.—Q. Mr. Rancadore, in departing from the use of your mold or the Greco mold and taking up the work of canning these beans in your factory under the mold which is marked Exhibit No. 2, that is, the long one, the difference in cost of packing is simply the difference in cost of putting the hand around the beans and putting them in the can, instead of sliding them in?

A. The girls can do it just as quick with this as with the mold; in fact they make more money with this than with the mold; we used to pay 19 cents a tray, and when we got started with this mold it cost 20 cents by this method, which is a cent more per tray of 19 cans.

(Testimony of I. Rancadore.)

Q. When you went back to the method of Exhibit No. 2, you had to pay an extra cent a tray?

A. We paid an extra cent for the girls to be satisfied, and we found they were making too much money, in fact, they were doing it faster by this method than by the mold, but we started at 20 cents and we did not want to reduce it, so we kept on paying 20 cents.

Q. So that, irrespective of whether the girls were entitled to it, or not, the difference in cost on account of handling it by hand was about a cent a tray?

A. A cent a tray.

Q. A tray, you said, consisted of 19 cans?

A. Yes.

TESTIMONY OF EUGENE J. FILICE, FOR
DEFENDANT.

EUGENE J. FILICE, called for the defendant;
sworn.

Mr. ARMSTRONG.—Q. Where do you reside?

A. 384 Willow Street, San Jose.

Q. What is your business?

A. I am connected with the San Jose Canning Company.

Q. How long have you been connected with the San Jose Canning Company?

A. I was with them in 1920, the season, and then the season of 1921 the plant did not run, and I went back to them in September of 1923.

(Testimony of Eugene J. Filice.)

Q. What was your position with the canning company in 1920? A. Superintendent.

Q. You have been, except for the year 1921, superintendent ever since?

A. I have been superintendent since January 1, 1924.

Q. You went back to them as superintendent—you stated you went back in 1923.

A. Not in the capacity of superintendent; I was there as master mechanic from that time until the 1st of January, 1924.

Q. So that you were there in 1920?

A. I was there the season of 1920 to the spring of 1921.

Q. And then there was no pack that year?

A. There was no pack.

Q. And you left then? A. Yes.

Q. Then you went back to the canning company when? A. In September of 1923, September 28.

Q. September 28th? A. Yes.

Q. During the time that you were out of their employ, were you about the establishment?

A. Occasionally.

Q. Were you there in the spring of 1922?

A. I was there in July of 1922.

Q. Did you see Mr. Rancadore, or anyone else, in the factory experimenting with any measures, or molds, or anything of that kind? A. Yes.

Q. Are you the man he referred to in his testimony as the superintendent at that time?

A. Not at that time in 1922.

(Testimony of Eugene J. Filice.)

Q. But did you experiment with him on that?

A. Yes, I did experiment with him on this mold here, No. 1.

Q. Did you see Mr. Rancadore, or did you and Mr. Rancadore and others there pack beans in what is called the bunch or asparagus style in 1922?

A. Yes.

Q. And used that mold or measure, Defendant's Exhibit No. 1? A. Yes.

Q. And, using that mold or measure, Defendant's Exhibit No. 1, you put them into that mold and then used your hands in putting them into the can: Is that the idea? A. Yes.

Q. First cut them?

A. First cut them one end and then the other, and then take them with your hands and place them into the cans.

Q. Did you find that that could be worked with great facility? A. Yes.

Q. It was done by way of experiment to find out whether you could do it by hand? A. Yes.

Q. Then in 1923, did you have anything to do with experimenting in the same way of packing by hand? A. I did not, not in 1923.

Q. You were not present when they tried out a few cans, using mold No. 2? A. Not in 1923.

Q. In 1924, did you?

A. In 1924 I was there, I was superintending the plant then, and I made experiments during that time with Mr. Rancadore.

Q. What method of packing beans in the bunch

(Testimony of Eugene J. Filice.)

form or asparagus style was used in 1925, 1926, and 1927? A. This mold No. 2.

Q. Indicating Defendant's Exhibit No. 2. Does the use of Defendant's Exhibit No. 2, that is that long mold, retard the work of packing beans in the bunch form or asparagus style?

A. No, it speeds it up, I believe.

Q. You think the girls are able to pack more?

A. They are packing more, the capacity of one woman is more now than it was with the mold form.

Q. Irrespective of that, she gets more money per tray than she did when she packed under the mold form?

A. There is more production, more cans turned out per day. Of course, they make more money, because they are running more cans.

Q. Were you there when they were using the Rancadore mold?

A. The year of 1924 they used that.

Mr. RANCADORE.—1922.

Mr. LINN.—We want this witness' testimony, not yours, Mr. Rancadore.

Mr. ARMSTRONG.—What is your best recollection? Any year that you were there were they using the Rancadore mold?

A. Well, in 1924 they used that.

Q. You are sure of it, 1924? A. Yes.

Q. At that time you paid the girls less per tray than when you went back to No. 2?

A. One cent a tray less, 19 cents in the mold form and 20 cents in this.

(Testimony of Eugene J. Filice.)

Q. But your experience is in the last three years during which you used Defendant's Exhibit No. 2, it shows there is greater facility in pack, more pack per girl? A. Yes.

Q. Where did you work in the years 1922 and 1923 when you were not working for the San Jose Canning Company?

A. In the year 1921, on the 18th of September, I took a position with Mr. Victor Greco in his cannery.

Q. What position did you have there?

A. I was assistant superintendent.

Q. Did your duties require you to oversee the packing of beans asparagus style, with the so-called Greco mold?

A. I did not have anything to do with overseeing it; of course, naturally, I was around the plant and saw it done.

Q. Do you know what was being paid per tray for the work of packing?

A. From what I can recall of that it was, I believe, 25 cents per tray of 19 cans.

Q. What did Mr. Greco pay his girls for packing beans asparagus style?

A. 25 cents a tray of 19 cans.

Q. How long were you in the employ of Mr. Greco?

A. From the 18th of September, 1921, to the 18th of September, 1923.

Q. During all of that time was there any change in the price paid to the girls using that mold?

(Testimony of Eugene J. Filice.)

A. Not that I can remember, with the exception of 1923 there was a change made, and instead of having the women tip the beans and sort them, the canneries were running them without tipping, but to my recollection there was an advance made, but I cannot remember the price.

Q. Didn't the payment of that higher price make trouble between the girls or employees working in the two factories, one getting 25 cents a tray and the other 20 cents a tray, and using the same method?

A. Not a material difference—it was not noticeable; it did not come to our attention or notice.

Cross-examination.

Mr. LINN.—Q. Mr. Filice, you worked for Mr. Greco in the year 1922?

A. From September, 1921, to September 23, two years.

Q. You worked in Mr. Greco's plant while he was canning beans under the Greco patent? A. Yes.

Q. You saw that in use? A. Yes.

Q. And helped in the cannery during that season? A. Yes.

Q. As assistant superintendent? A. Yes.

Q. Then you went to Mr. Rancadore's cannery, the San Jose Canning Company, the defendant, here, on September 28, 1923? A. Yes.

The COURT.—Q. Are you still in his employ?

A. Yes.

(Testimony of Eugene J. Filice.)

Mr. LINN.—Q. You began work for Mr. Rancadore, then?

A. Yes.

Q. You were not superintendent at first?

A. Not until the 1st of January, 1924.

Q. Immediately upon entering the plant you started some experiments with this mold, No. 1?

A. No, not in 1923. That was after the string beans were packed, September 28, that was beyond their pack, it was tomato pack.

Q. Then when did you first start working on mold No. 1?

A. On this mold No. 1, in July of 1922.

Q. July, 1922? A. With this No. 1.

Q. Where were you then working?

A. I was working for Mr. Greco at that time. This experimenting took place one evening, late one evening.

Q. While you were still working for Mr. Greco?

A. Yes.

Q. You went over to the San Jose Canning Company? A. Yes.

Q. And worked on this No. 1 mold? A. Yes.

Q. It was evident at that time that asparagus-pack string beans were a success?

Mr. ARMSTRONG.—I object to that as calling for a conclusion of the witness.

Mr. LINN.—Let me finish the question.

Q. You were working with Mr. Greco on that pack and you went over in the evening to see Mr. Rancadore, and tried to work out something else?

(Testimony of Eugene J. Filice.)

The MASTER.—That is simply a comment on the evidence already in.

Mr. LINN.—I will withdraw the question.

Q. In 1922 you worked at night on this model No. 1? A. Yes.

Q. And canned about six cans of string beans?

A. Yes, about six cans.

Q. At night? A. Yes.

Q. Did you work nights in that plant?

A. I was not working there, I was called there on account of some difficulty they were having in the No. 10 gallon cans; they were having trouble with the bulging out of them after they were cooked; the gallon cans were not coming out perfect.

The MASTER.—Q. Now, just tell me what happened.

A. I was called over there by this Mr. Cusimano, who was assistant superintendent at the time, and who was taking care of this cooking, and on account of this difficulty he came and got advice from me while I was in the employ of Mr. Victor Greco, so I promised him I would be over that evening and help him out on it, and while I was there that evening looking over his difficulty in the No. 10 cans, this thing had been brought out, after I was there a while, and we tried the packing of string beans with this No. 1 mold.

Q. What was done?

A. Well, Mr. Rancadore, and Mr. Cusimano, and myself, we got some string beans, we blanched them, we put beans in this No. 1 form, here, we cut off one

(Testimony of Eugene J. Filice.)

end, and later the other, and then we got the beans by hand and placed the back part of this bunch into the can, first, and then applied the thumbs, in squeezing, got the front part started, and when that was done, with the aid of bouncing, we began pushing into the can, and we saw they would slide down into the can very conveniently.

Q. What did the beans look like after that?

A. They looked exactly like they would with the mold that we used, in fact they were better; you could get more in there; due to the mold being smaller in diameter than the can, you naturally could not get as many in with that as you could squeezing them by hand.

Mr. LINN.—Q. Is the object to get in as many beans in the can as possible?

A. Yes, you want to get in as many as possible to held them up.

Q. And make a good product?

A. If they fall apart that indicates they are packed loose, and if they stay together it is an indication that they are packed tight.

Q. That evening, when you went over to Mr. Rancadore's plant at the solicitation of Mr. Cusimano, you saw Mr. Rancadore, of course, and worked with him? A. Yes.

Q. And at that time you knew there was litigation between Mr. Greco and the San Jose Canning Company over this very product?

Mr. ARMSTRONG.—There was not any such litigation, because they held a license in 1922.

(Testimony of Eugene J. Filice.)

Mr. LINN.—Let the witness answer.

Mr. ARMSTRONG.—I object to it, because it assumes a fact that is not true, not on the record, that in 1922 there was any litigation. He held a license in 1922, and the record shows it.

Mr. LINN.—There was litigation between Victor Greco—

Mr. ARMSTRONG.—You are changing the question.

The MASTER.—Reframe your question.

Mr. LINN.—Q. And at that time you knew there was litigation between Victor Greco and the San Jose Canning Company over this very product?

A. No. The way I understood it, Mr. Rancadore had obtained a license to pack, and there was no difficulty in 1922.

Q. You knew, did you not, at that time, that Mr. Victor Greco had filed a suit in the Federal Court, and, prior to that, a suit in the State Court at San Jose? A. No, I did not.

Q. One moment—to enjoin the canning of string beans asparagus style by Anthony Greco, and by the San Jose Canning Company, as a licensee of Anthony Greco? A. No, I did not.

Q. You never knew that?

A. I knew that Mr. Greco had a patent before that, and knew that Mr. Rancadore had a license to pack under that patent.

Q. You knew he had a license from Anthony Greco? A. Yes.

Q. And you knew that Anthony Greco and Vin-

(Testimony of Eugene J. Filice.)

cent Greco were in litigation over the ownership of that patent? A. No, I did not know it.

Q. You did not know that?

A. I did not know that the brothers were in litigation about the patent.

Q. You did not know that? A. No.

Q. Mr. Rancadore did not tell you that evening that he had been enjoined, or they were seeking an injunction, and had filed suit against him to keep him from packing under the license from Anthony Greco?

Mr. ARMSTRONG.—I would like to know the date when the first suit was filed by Anthony Greco against Victor Greco. Have you it there?

Mr. LINN.—I have not the exact date.

The MASTER.—Let the witness answer this question.

Mr. ARMSTRONG.—That is assuming something not in the record; that suit was not filed until long after this experimenting was conducted.

The MASTER.—I don't know that. I suppose the record is clear on it.

Mr. ARMSTRONG.—This goes to the credibility of the witness, and I ask permission to introduce both of these suits when we find out what they are.

The MASTER.—You can do that later.

Mr. ARMSTRONG.—May I reserve a motion to strike on all of these matters?

The MASTER.—Yes.

Mr. LINN.—Read the question.

(Last question repeated by the reporter.)

(Testimony of Eugene J. Filice.)

A. No.

Q. You never heard that at that time? A. No.

Q. How many times did you go over to the San Jose Canning Company and assist in their plant, or in making experiments, while you were in the employ of the Greco Canning Company?

Mr. ARMSTRONG.—You mean over the whole three years?

Mr. LINN.—Yes; while you were in the employ of the Greco Canning Company, how many times did you go to the San Jose Canning Company?

A. I went in the latter part of July, 1922, when their experiment was made with the No. 1 in packing a few cans there, about six.

Q. Did you go at any other time?

A. Not until in 1924.

Q. Not until 1924?

A. That is, not helping on this. I had been in the plant, but not helping on this.

Q. How many times did you go to that plant while you were working for the Greco Canning Company?

A. That would be pretty hard to say; I was living close by there, I had been interested in the firm, and I would occasionally go in there for anything that I could help out on.

Q. About how often?

A. I would say probably four or five times. It might have run more than that, I can't remember.

Q. Was there any discussion at any of these times

(Testimony of Eugene J. Filice.)

with reference to this Model No. 1, except the one instance you have testified to?

A. Not until 1924.

Q. In 1924 you were working there?

A. Yes, I was working there.

Q. But in 1922 that was the only time while you were working for the Greco Canning Company that you discussed this matter with Mr. Rancadore?

A. Yes.

Q. Did he tell you why he was making this experiment with Model No. 1?

A. Yes, to satisfy himself that this pack could be made by hand without using the patent, or without paying for a license under that patent.

Q. He did not tell you that he was being threatened with litigation? A. Not in 1922.

Q. In 1922 he did not mention that? A. No.

Q. He did not mention that they had told him sometime prior to that that Victor Greco, at least, would sue him?

A. No. I knew he had a license in 1922.

Q. Didn't you know that at the same time he was working on a mold of his own?

A. Not in 1922.

Q. You didn't know that in 1922?

A. No, that was taken up amongst themselves.

Q. How do you know that?

A. Because they were using a mold that they had made that they had applied for a patent on.

Mr. ARMSTRONG. — It is self-evident they

(Testimony of Eugene J. Filice.)

would not ask an outside superintendent to help them out with a mold of their own.

The MASTER.—Let the witness do the testifying.

Mr. LINN.—Q. You knew they were working on a mold of their own, didn't you?

A. Yes, they were canning beans with that.

The MASTER.—Q. In 1922?

A. In 1922.

Mr. LINN.—Q. Then they were working on this one, here, that you have just testified to, No. 1?

A. Yes.

Q. You testified that it is more practical to use Exhibit No. 1 than it was to use the Greco mold?

A. I don't get that.

Q. You have testified that it is more practical to use Mold No. 1 than it is to use the Greco mold.

A. It is an advantage that you can get more beans into a can.

Q. And do it easier and quicker?

A. It proved that way.

Q. To remove the beans from that block in both hands, press the hands together at the bottom, and insert the beans in the can, and then force them down by hand? A. Yes.

Q. That it is easier and more practical than the Greco mold?

A. Yes. The actual work has proved it now in the last two years.

Q. The Greco mold is the two half cylinders with a hinge, and a flange, and the lock? A. Yes.

(Testimony of Eugene J. Filice.)

Q. Which is inserted over the can and by a jar precipitates the beans?

A. By the end of a form going over the beans to go into the can they have got the work of one more additional tool.

Q. That is, they do that in the Rancadore?

A. Yes, with their mold, the same as Victor Greco with his mold.

Q. Have you discovered in stringing the beans, or cutting off the ends of these beans on this mold No. 1, using this mold No. 1, that sometimes the beans on the bottom layer would be kind of chewed off rather than cut off straight?

A. No, not unless you would have a dull knife.

Q. As far as you are concerned, that never happened? A. No, they were cut clean.

Mr. ARMSTRONG.—Q. You are referring to mold No. 1?

A. I am referring to mold No. 1.

Mr. LINN.—Q. Were these uprights stiffer in 1922?

A. Yes. That block, evidently, had been a little green or damp, so that those tacks driven at that time held it tight, but during the years that have passed that has dried out so that it has shrunk, and naturally makes those prongs loose.

Q. The bean is damp when it comes from the blancher? A. In some cases.

Q. Isn't it quite damp?

A. Yes, but not enough for the water to flow; but it is damp.

(Testimony of Eugene J. Filice.)

Q. You are interested in the San Jose Cannery, the defendant, here? A. I am now.

Q. When did you become interested?

A. In 1924.

Q. Were you interested in 1921?

A. I was interested in 1920, and in 1921.

Q. In the San Jose Canning Company?

A. Yes.

The MASTER.—Q. What is the defendant, a corporation?

A. A corporation.

Q. And it was then? A. Yes.

Q. Do you hold stock in it?

A. I held stock in it in 1920 and in 1921, and then, due to some losses we had, we liquidated that, we did not go broke, but we lost what we had in it, and I was out until I bought stock in 1924.

Mr. LINN.—Q. When you went back to work for the San Jose Canning Company on September 28, 1923, no experiments were made with any mold at that time?

A. In 1923?

Q. Yes.

A. No, it was after the season; we did not have any more beans on that date.

Q. When do you start packing string beans?

A. Generally along the 20th to the 25th of July.

Q. You pack them until what time?

A. What year?

Q. At what time of any year?

(Testimony of Eugene J. Filice.)

A. We will usually run a few days in July, August, and a few days in September.

Q. A few days in July, and a few days in September? A. Yes.

Q. And all of August? A. Yes.

Q. When did you start your experiments on mold No. 2? A. In 1924.

Q. What time of the year?

A. Well, along in July, the latter part of July.

Q. The latter part of July?

A. Yes, the first few days after we got started.

Q. Why did they extend the block beyond the uprights?

A. No particular reason, but I made these prongs, myself, later, and instead of making them shorter I began to make them longer. No particular reason.

Q. There was no particular reason for it?

A. No, no particular reason, I just happened to make them longer.

Q. You have been making them longer ever since?

A. All of the forms I am using are of this length.

Q. No reason for it, at all?

A. No reason for it at all.

Q. You started your experimenting in July and August, 1924? A. In July, 1924.

Q. You knew, then, as a result of those experiments, or, rather, as a result of the experiments with this mold No. 1, that beans could be successfully canned asparagus style? A. Yes.

(Testimony of Eugene J. Filice.)

Q. Without the use of the Greco patent?

A. Yes.

Q. You knew that? A. Yes.

Q. And it could be done cheaper?

A. At the time I did not know it could be done cheaper. As a matter of fact, it proved so.

Q. You did know in 1924 that it could be done cheaper?

A. I knew it in 1924. We did not go commercially into it in 1924.

Q. You knew in 1925 it could be done?

A. Yes.

Q. However, despite the fact that you knew in the year 1925 it could be done cheaper, you continued to pack under the Greco mold in the year 1925?

A. No, we did not. We packed with this mold in the year 1925.

The MASTER.—Q. No. 2?

A. No. 2.

Mr. LINN.—Q. In the year 1925?

A. Yes.

Q. Do you know as a fact that the decree of the District Court finally enjoining the use of the Greco mold was not signed until June 23, 1925?

Mr. ARMSTRONG.—Objected to as the record is the best proof of when it was signed.

The MASTER.—He wants the witness' knowledge. The objection is overruled.

Mr. ARMSTRONG.—Exception.

A. That I don't remember.

(Testimony of Eugene J. Filice.)

Mr. LINN.—Q. You were interested in the San Jose Cannery, weren't you?

A. Yes, I was interested in the cannery, but I don't just remember that particular thing.

Q. You knew that litigation was pending?

A. Yes.

Q. You knew that it had been decided against the corporation on the 23d of June, or some time during June, 1925?

A. That our mold was an infringement on the Greco?

Q. Yes. A. Yes, I knew that.

Q. And you knew at that time that it was cheaper to use device No. 2? A. In June, 1925?

Q. Yes.

A. How could we? We were not packing. I told you it was 1925, during the pack, that I found out it has been cheaper. I naturally could not find out before I run it.

Q. You packed in 1925 by that? A. Yes.

Q. As far as you are concerned, as superintendent of the plant, there is no advantage in the use of device No. 2 in evidence over device No. 1?

A. No.

Q. None, at all? A. No.

Q. In the Greco mold, there is a uniformity of size of the pack, is there not?

A. In what respect?

Q. Well, that the number of amount of beans that would be contained in the mold, that can be

(Testimony of Eugene J. Filice.)

contained in the mold is constant, the same every time? A. Yes.

Q. In this device, either No. 1 or No. 2 in evidence, it will vary with the individual who is using it, the size of the hand, and the inclination of the person who is using either device No. 1 or No. 2 in evidence?

A. No, these forms are all exactly alike; they get the beans in there, probably within one or two beans difference, but these beans may vary in size, so that the amount would be the same, but if they tried to press more in the can they naturally couldn't do it, but they put in as many as possibly would go, and, therefore, there is bound to be very near a uniform fill in the cans.

Mr. LINN.—I think it might help the Master if we both stipulate that we will produce a sample of the Greco and then one of the defendant's.

Mr. ARMSTRONG.—The Court has already passed on this, unless the Master wants it.

Mr. LINN.—Just to look at them.

Mr. ARMSTRONG.—If the Master wants it I am perfectly willing, but the Court has already passed on it. I will stipulate that we can go out in the market and buy a few cans of the Greco and of the San Jose Canning Company and put them in.

Mr. LINN.—We will do that. That is all.

Redirect Examination.

Mr. ARMSTRONG.—Q. Mr. Filice, when you went over to the San Jose Canning Company on that

(Testimony of Eugene J. Filice.)

evening in 1922, when this experimenting with Exhibit 1 was had, you did not go over there for the purpose of taking part in any such experiment, did you?

A. No, I went over there for the purpose of helping in a difficulty with the No. 10 can.

Q. You did not? A. No.

Q. Did you know they were going to bring up anything like that? A. No.

Q. Is it customary among the canners canning the same product, among superintendents, to get together and discuss the various methods of handling the product, and business methods?

A. In some respects.

Q. You, canners, talk together over your difficulties and troubles? A. Yes.

Q. And in a matter like this, where a patent is involved, you are perfectly free with your devices to each other, about cooking and packing, are you not? A. Yes.

Q. There is nothing wrong about that?

A. No, nothing at all.

Q. And during the time that you were employed by Greco you had no interest in the San Jose Canning Company? A. No interest.

Q. You had lost your interest? A. Yes.

Q. They had gone out of business, practically?

A. Yes, I was there on occasions, I had some money coming from the firm, and at times I would go there for interest; that was what brought me

(Testimony of Eugene J. Filice.)

there at times for the interest in money I had coming.

Q. You did not make that first mold No. 1?

A. No.

Q. They had that there when you got there?

A. They had it there.

Q. After you discussed the question of cooking the gallon cans with them, they brought this out and showed it to you? A. Yes.

Q. You saw them working with it?

A. I saw them working with it.

Q. You did not consider that you were doing anything disloyal to the Grecos in doing that?

Mr. LINN.—We will stipulate that his answer is “No.”

Mr. ARMSTRONG.—Q. You were asked a question here about the number of beans that went into a can, whether the same amount would not always be put in by the mold. You did not mean the same amount in number of beans?

A. No, not the same amount in number of beans, the same amount in quantity; the number of beans will vary; beans vary in size, and, naturally, you would have more or less.

Q. The number of beans in a can depends, of course, on the size of the beans, themselves?

A. Yes.

Q. And as to quantity, don't different canners pass looser than others?

A. Do you mean different canners pack looser than others?

(Testimony of Eugene J. Filice.)

Q. Yes.

A. I imagine our pack is a little bit tighter.

Q. But you have been in the trade for quite a while? A. Yes.

Q. And you are familiar with the pack of different packers, in the lines that you pack, beans, tomatoes, and things like that? A. Yes.

Q. And you know that some packers pack a little looser, pack a lesser amount of products than others?

A. Yes. The only beans I have seen packed asparagus style is what we pack and the Greco Canning Company.

Q. And from your experience in both factories, do you think that you pack a little tighter than the Greco? A. A little tighter.

Mr. ARMSTRONG.—That is all.

Mr. LINN.—No further questions.

TESTIMONY OF MATTEO CUSIMANO, FOR
DEFENDANT.

MATTEO CUSIMANO, called for the defendant, sworn.

Mr. ARMSTRONG.—Q. Where do you live, Mr. Cusimano?

A. 1045 Vine Street, San Jose.

The MASTER.—Be careful and do not lead the witness. The examination of the last witness was hurt a little bit by that.

(Testimony of Matteo Cusimano.)

Mr. ARMSTRONG.—I was simply trying to hasten along.

Q. Mr. Cusimano, in the year 1922, what was your occupation?

A. I was a mechanic and assistant superintendent in the San Jose Canning Company.

Q. When did you first see that block, there, indicating Defendant's Exhibit No. 1.

A. You mean when I saw that?

Q. When did you first see it. A. I made that.

Q. When did you make that?

A. The latter part of July, I couldn't tell exactly.

Q. What year? A. In 1922.

Q. For what purpose was that made?

A. The form like that was made to get the quantity of the beans, I understand.

Q. You made that to get the quantity of the beans? The quantity of the beans.

Q. How were the beans to be packed, in what way? A. Asparagus style.

The MASTER.—Q. Who told you to make that?

A. Mr. Rancadore said that he would like to have something of this kind to see how it would work, and I worked it out the best I could. I bent up a couple of pieces of iron.

Mr. ARMSTRONG.—Q. Did you see them trying to pack beans, using that mold? A. Yes.

Q. When was that done?

A. That was that same evening that I had made that.

(Testimony of Matteo Cusimano.)

Q. Did they pack any beans from that mold into cans? A. They packed a few cans, yes.

Q. How did it work? Were they able to pack?

A. It was satisfactory, as far as I understand from Mr. Rancadore.

Q. They had to lift the beans out of the mold and put them into the can? A. Yes.

Q. Did they make a good, solid pack?

A. They filled in pretty good.

Q. How about the cutting of the beans. The beans have to be cut, don't they? A. Yes.

Q. How about the cutting of the ends on that No. 1 mold, that one, there, that you made?

A. The only difficulty is when the knife is dull. If the knife is good and sharp it cuts every one. In fact, we had no trouble at that time.

Q. Were you employed continuously from 1922 on by the San Jose Canning Company?

A. Practically, yes.

Q. Are you employed by them now? A. Yes.

Q. In 1922, were you familiar with the method of packing beans in bunch form, asparagus style?

A. No, that is, not in asparagus style.

Q. You are not familiar with the canning?

A. No.

Q. Do you know how the San Jose Canning Company packed them in those years?

A. The way they packed, when I had work in there and saw, there was no mold used in those years.

(Testimony of Matteo Cusimano.)

Q. But when they packed them in 1922, do you know how they packed?

A. When I went in in 1922, when they started in in July, I found this mold, and it was already prepared to be used for the asparagus style of beans, so we did start out and we worked a few days, a week or so, I wouldn't say any more, and that was the time, I made this, and we tried it out.

Q. You got it out and you packed the beans with it? A. Yes, tried it out.

Q. Have you ever seen that mold No. 2 there?

A. Yes.

Q. Defendant's Exhibit No. 2? A. Yes.

Q. When did you first see that?

A. The No. 2, I don't remember exactly, but I think it was in 1924; if I don't mistake it was in 1924. I seen Mr. Filice trying it out.

Q. In that year they used quite a few of these, did they? A. Just experimented in 1924.

Q. How about 1925?

A. In 1925 they began using them.

Q. And 1926?

A. The same thing, they used this method ever since.

Q. In 1927? A. Ever since.

Q. No more molds? A. No more molds.

Q. Were you familiar with the mold that is referred to as the Greco mold? A. Yes.

Q. Did you ever see it around the factory?

A. Yes.

(Testimony of Matteo Cusimano.)

Q. Were you familiar with the mold that Mr. Rancadore got the patent on?

A. Well, I don't really know what mold Mr. Greco had, I don't know exactly, but I know exactly what we had there; I don't know Mr. Greco's mold, I am not familiar with it.

Q. Do you remember the night that you experimented with the canning with your No. 1 mold, who was there when you made that experimenting?

A. There was present me and Mr. Rancadore, and a little later Mr. Filice. I had called him.

Q. What did you call him for?

A. I had a little trouble not exactly trouble, but I was not satisfied with the cook of the No. 10 cans, what they call gallons, I did not feel safe on it, the tins would not come back in proper shape, they bulged up on the lid, so I didn't feel safe, and I asked the superintendent, there, and he told me then he had no experience whatever in that, and I told him I wanted to see Mr. Filice, if he didn't mind. I says, "I am going to ask him about this," and one day I went over there and asked him to come and see what was wrong, I told him just what it was, and he said, "I will come down and see you and help you out," and when he came down, at the same time we were trying this little thing out.

Q. You did not call him over there for the purpose of having him look at it? A. No.

Q. Did he make any particular date with you to come and give you advice about the bulging of the No. 10 cans?

(Testimony of Matteo Cusimano.)

A. Yes, he told me he will come in soon, if he saw lights in the cannery he would come in. He said, "I may come in pretty late, you may be home when I come in, but if I see lights I will come tomorrow night."

Q. Was there any particular time set that he would come in? A. No, no particular time.

Cross-examination.

Mr. LINN.—Q. Mr. Cusimano, it was in July, 1922, that the first suggestion to make this mold was made by Rancadore?

A. Yes, he asked me to make it.

Q. He asked you to make it? A. Yes.

Q. He was canning string beans then asparagus style? A. Yes.

Q. With the use of a mold? A. A mold.

Mr. LINN.—I think it will be stipulated, Mr. Armstrong, that that was the mold that Mr. Rancadore attempted to have patented, or did have patented.

Mr. ARMSTRONG.—You are talking about 1922?

Mr. LINN.—Yes.

Mr. ARMSTRONG.—Yes.

Mr. LINN.—And at that time you will also admit that he had a license from Anthony Greco for the use of the Greco mold?

Mr. ARMSTRONG.—Yes, I will admit that, although I do not believe it is relevant, and I will object to its being considered.

(Testimony of Matteo Cusimano.)

Mr. LINN.—Q. At that time, in July, 1922, what part of the month of July did this meeting take place?

A. Just about the end of July. I don't know the exact date.

Q. How long did it take you to prepare this mold?

A. It didn't take me long, I should judge about 30 minutes.

Q. About 30 minutes? A. Yes.

Q. Did you make it that night in July, or did you make it during the afternoon?

A. I made it in the evening.

Q. After Mr. Filice had arrived there?

A. No, I made it before. Mr. Filice came after I had everything made up, and was just about ready to try it when he came in.

Q. You knew that Mr. Filice was probably going to be there that evening if you stayed there late enough? A. I didn't expect him sure.

Q. What time of the evening was it?

A. It must have been pretty late.

Q. How late?

A. I should say maybe around ten o'clock, probably.

Q. Ten o'clock, in San Jose?

A. Not exactly that, around that time; that is pretty late.

Q. When Mr. Filice came was Mr. Rancadore there already?

A. Mr. Rancadore was there already with me.

(Testimony of Matteo Cusimano.)

Q. You had already been canning string beans asparagus style with this other mold?

A. With the other mold.

Q. Did Mr. Rancadore tell you why he wanted this mold made, No. 1, I am referring to?

A. Not exactly. He asked me if I could rig up something that would be reasonably good enough to use in place of this mold, and I rigged it up in a few minutes' time, and I didn't pay any particular attention to it.

Q. Did he tell you at that time that the Greco Canning Company had sued him because he was using the mold that he was using. A. No.

Q. He did not tell you that? A. No.

Q. You never heard of that at that time?

A. I never heard a thing about it.

Q. You canned how many cans of string beans?

A. Probably half a dozen or eight, no more.

Q. Have a dozen or eight cans?

A. Yes, no more.

Q. What did you do with them?

A. Destroyed them.

Q. You destroyed them? A. Yes.

Q. Then nothing was said again until November 24 about this mold? A. No more.

Q. What happened in 1924, if you know?

Mr. ARMSTRONG.—About what?

Mr. LINN.—About this mold.

A. About this mold, I don't know what it was, but I think I saw Mr Filice one day practicing himself; I am always busy in the cannery, it is like

(Testimony of Matteo Cusimano.)

running an airplane, one thing and another goes wrong, and I didn't pay attention exactly.

Q. About what time of the year 1924?

A. Well, probably the beginning of August, or so, I don't know exactly.

Q. About the beginning of August?

A. I couldn't say. I was very busy, and I didn't see what he was doing, I didn't pay any attention.

Q. About the beginning of August, you say?

A. I should think so, but I am not sure.

Q. The latter part of July, possibly, then?

A. Possibly; I could not exactly tell you the date.

Q. Was it the beginning of the canning season?

A. Not very far from it.

Q. Just around the beginning of the canning season? A. Yes.

Q. You saw Mr. Filice working on this model, too?

A. I don't know what he was doing, but I saw him practicing, and I didn't stop to pay attention, because I had no time.

Q. What was your position in 1924?

A. Mechanic and assistant superintendent.

Q. Didn't you bend the iron bars there for the second model? A. Not on the second one.

Q. Who would do that in the plant, if not you?

A. If I had no time they would give them out to have them bent. I don't know whether Mr. Filice bent them.

Q. It happened sometime in the latter part of July, or early August?

(Testimony of Matteo Cusimano.)

A. Yes, some time in the latter part of July or the first of August that I saw him practicing.

Q. Did you have any conversation with Mr. Felice or Mr. Rancadore at that time about it?

A. None, whatever.

Q. Did you ever see them used in the plant at that time?

A. Just for practicing, that is all I noticed, very little.

Q. A very, very little? A. Very little.

Q. Maybe another half a dozen cans?

A. I couldn't say exactly.

Mr. LINN.—Will it be stipulated at this time, for the purpose of the record, Mr. Armstrong, that the order to show cause in this case now under consideration was issued on July 18, 1924?

Mr. ARMSTRONG.—If you have the record there I will look at it and stipulate. I won't stipulate to anything but what is in the record.

Mr. LINN.—I will show you the record, it was returnable on the 24th of July, 1924

Mr. ARMSTRONG.—You will remember I don't know anything about the record, because I did not come into the case until it was ready to try.

The MASTER.—That is the record in this case?

Mr. LINN.—Yes.

The MASTER.—You do not need to stipulate. I can refer to it.

Mr. LINN.—And that a temporary restraining order was issued on the 2d of August, 1924, which

(Testimony of Matteo Cusimano.)

was held in abeyance by a bond filed on August 2, 1924.

Mr. ARMSTRONG.—That is when I first came into the case, and I will stipulate to that.

Mr. LINN.—Did you know about this litigation, or did Mr. Rancadore say anything to you about him being sued in July or August, 1924? A. No.

Q. He did not say to you that it might be possible that he would have to abandon the use of the mold that he was using and use something else?

A. He did not tell me anything.

Q. He did not say anything about it? A. No.

Q. At the time that you had the meeting with Mr. Filice and Mr. Rancadore that evening, did they tell you that at that time suit was started, and it was quite likely they would have to abandon the mold? A. No.

Q. Did you have any experience in packing, at all, Mr. Cusimano, or are you just a mechanic?

A. Well, naturally, I am around the cannery all the time, and I see a little of everything.

Q. You take that mold No. 1 in your hand; if a girl has a knife and is going to cut off the end of the beans—

Mr. ARMSTRONG.—Do you think you have qualified him as an expert?

Mr. LINN.—Do you want to withdraw him as an expert?

Mr. ARMSTRONG.—I put him on as a fact witness.

(Testimony of Matteo Cusimano.)

Mr. LINN.—Q. You know how these beans are canned?

A. I have seen them canned.

Q. Sometimes you canned them?

A. Not exactly.

Q. You have been around a cannery how many years? A. Since 1919.

Q. How many years before that in the cannery business? A. That is the beginning.

Mr. LINN.—Do you consider him qualified, Mr. Armstrong?

Mr. ARMSTRONG.—I do not yet.

The MASTER.—You have not got any question. Ask your question.

Mr. LINN.—Q. Mr. Cusimano, when a girl is using that model No. 1—

Mr. ARMSTRONG.—Ask him whether he ever saw a girl use it.

Mr. LINN.—Q. When a girl is using that model No. 1, that is in evidence—

Mr. ARMSTRONG.—We have nothing in the record, as far as this record is concerned, that a girl ever used it.

The MASTER.—Ask your question, and let the objection be made after the question is asked.

Mr. LINN.—Q. If a girl is using that model No. 1 and she uses a knife, as she will have to to cut off the end of the beans, is it not possible and probable that some of these beans will be kind of chewed off at the end, rather than cut nice and straight?

(Testimony of Matteo Cusimano.)

Mr. ARMSTRONG.—I object to this question on the ground it calls for the conclusion of the witness, second no foundation is laid, third, that it is purely a hypothetical question, and that the witness is not qualified as an expert.

The MASTER.—Overruled.

Mr. ARMSTRONG.—And it is immaterial, irrelevant, and incompetent for those reasons. Exception.

A. Not if careful.

Mr. LINN.—Q. Not if careful, but in your experience in canneries you found that girls are not always careful, isn't that true?

Mr. ARMSTRONG.—Objected to as calling for the conclusion of the witness.

The MASTER.—Overruled.

Mr. ARMSTRONG.—Exception.

A. They have to be carefully watched. I really don't know what you have got there, I never tried it. The only thing that I tried was that evening.

Mr. LINN.—Q. Well, take No. 2, a girl using model No. 2, with a knife to cut off the ends of the beans, she doesn't have to be so careful, does she?

A. I should judge it will cut clean this way and probably the other way. I would not swear.

Q. Probably it will, and possibly it won't: Is that what you mean?

A. I don't say possibly it won't, but if I have a sharp knife it cuts it.

Q. You are a practical mechanic, aren't you?

(Testimony of Matteo Cusimano.)

The MASTER.—I can judge as well about that as another witness, I think.

Mr. LINN.—Q. Are you financially interested in the San Jose Canning Company?

A. No.

Q. You just work for them? A. Yes.

Redirect Examination.

Mr. ARMSTRONG.—Q. I think you said, when I first questioned you about the year—what year did you first see that model No. 2, Exhibit No. 2?

A. I should judge that was in 1924.

Q. You are quite positive you did not see it in 1923?

A. I am not sure, I couldn't swear to it.

Q. You are not sure whether 1924 was the first time you saw it, or not? A. No. 2?

Q. Yes.

A. It must have been I saw it in 1924—maybe it was in 1923, also.

Q. I do not mean when they started to use it altogether, but when it was first made.

A. When it was first made, of course, this was 1922, but tried later, I am not exactly sure.

Q. But it might have been used considerably in 1923 and you not know it? A. Probably.

Mr. ARMSTRONG.—That is all of our testimony.

TESTIMONY OF VICTOR GRECO, FOR
PLAINTIFF.

VICTOR GRECO, called for the plaintiff,
sworn.

Mr. LINN.—Q. What is your full name?

A. Victor V. Greco.

Q. You reside in San Jose? A. Yes.

Q. What is your business?

A. President and general manager of the Greco
Canning Company.

Q. How long have you maintained that position
in the cannery in San Jose?

A. General manager since 1913; president and
general manager since 1917.

Q. Mr. Greco, you are familiar with the canning
of string beans? A. I am.

Q. How long have you been familiar with the
canning of string beans? A. Since 1913.

Q. When did you first start canning string beans
asparagus style by use of the Greco patent, or any
other method? A. During the season of 1916.

Q. Did you continue to so pack beans for some
time from that time? A. Yes.

Q. Prior to the year 1922, do you know whether
or not beans were canned by any other person, firm,
or corporation, other than the Greco Canning Com-
pany? A. No one else packed them.

Q. Asparagus style? A. Asparagus style.

Q. Are you familiar with the canned vegetable
market? A. Very much so.

(Testimony of Victor Greco.)

Q. You are familiar with the products that are marketed? A. I am.

Q. You have visited brokers in New York, Chicago, and other places? A. I have.

Q. In an effort to sell your own products?

A. I have.

Q. Have you ever seen on the market string beans packed asparagus style, other than your own pack, and later the pack of the San Jose Canning Company? A. None.

Q. Do you know when Mr. Rancadore first packed string beans asparagus style? A. 1922.

Q. 1922? A. Yes.

Q. I hand you Defendant's Exhibit No. 1 in evidence, and ask you, relying upon your experience as a packer, if that model or mold is practicable in the canning of string beans asparagus style?

A. Not practicable.

Q. Why is it not practicable?

A. For several reasons.

Q. Give the reasons.

A. It would not shear off the ends even or square, and then, on bunching them in your hand, when inserting into the can you could not keep the ends perfectly square or even, because in the movement it would be possible that the beans would slip, or some of them would slip, and, therefore, when in the can they would not be perfectly even, and if uneven at one end they would be uneven at the other end.

(Testimony of Victor Greco.)

Q. Could you push them down after they were in the can? A. Not without injuring the bean.

Q. In canning string beans asparagus style, Mr. Greco, the principal virtue is in the looks of the product and the appearance of the bean coming out whole? A. Yes.

Q. And it is in the natural state, except it has been tipped at either end?

A. Yes, and because of that condition there is a differential in price, about double; in other words, the beans that are cut, the same beans will sell from \$1 to \$1.15 per dozen, or \$2 to \$2.30 per case, there being two dozen to the case, while the asparagus beans sell all the way from \$4 to \$4.50 a case, all on account of the appearance.

Q. In model No. 2, which you see here on the Master's desk, the ends can be sheared off to better advantage? A. Yes.

Cross-examination.

Mr. ARMSTRONG.—Q. Mr. Greco, you testified that during all of the years that you have been packing beans asparagus style you have never seen any beans packed asparagus style except yours and those of the San Jose Canning Company?

A. Yes, up to 1922.

Q. Up to 1922? A. Yes.

Q. What about the conditions since 1922?

A. Mr. Rancadore has packed them, and there was another concern in the San Joaquin *Joaquin*

(Testimony of Victor Greco.)

Valley to whom a license had been sold to pack them, and who are since out of business.

Q. What license—your license?

A. Yes, Greco patent license, and another concern.

Q. What did that licensee pay for that license?

Mr. LINN.—We object to that as immaterial, irrelevant, and incompetent.

The MASTER.—The objection is sustained, as the price is not material.

Mr. ARMSTRONG.—Q. Did you ever hear of the Pride Packing Company?

A. I was going to mention that the Pride Canning Company was also canning.

Q. When did they first start to can?

A. I think in 1925 or 1926.

Q. Are you sure they were not packing in 1922?

A. Positively not, and maybe not in 1925.

Q. You said that the only advantage of packing beans asparagus style was that they had a better look, and, by reason of looking better, they commanded a better price? A. I did.

Q. That is your idea? A. Yes.

Q. Quality had nothing to do with the price?

A. Well, that makes the quality.

Q. The looks do not make quality. You might have put celluloid beans in there and they looked fine, but that would not make quality.

Mr. LINN.—I object to the question as argumentative.

Mr. ARMSTRONG.—It is argumentative.

(Testimony of Victor Greco.)

Q. You say that all that makes the difference in price as between the asparagus style beans and beans that have been packed in the customary cut style is the looks of the bean, the quality does not make any difference, at all?

A. Naturally it has got to be a bean, and not celluloid, as you say. We are talking about beans.

The MASTER.—You mean that the appearance is what gives it the differential in price?

A. That is what I mean, yes.

Mr. ARMSTRONG.—Q. You also testified that by reason of this appearance, and having them packed asparagus style enabled you to sell beans for a selling price of about \$4 a case? A. I did.

Q. About how long have you been getting \$4 a case for them?

A. We were getting \$4 a case, \$4.50 a case, in 1922.

Q. That is, a case of two dozen?

A. A case of two dozen, \$4.50 in 1923, 1924, and in 1925, while the San Jose Canning Company, which is the Rancadore cannery, is getting \$4 a case for the same beans, that is, beans packed the same style, that is, cutting our price by 50 cents a case.

Q. Now, on the question of price, since you mentioned it, the cut beans of prime quality bring \$4 a case, don't they? A. They do not.

Q. What are the distinctions in quality in canned beans, irrespective of whether they are asparagus style pack, or cut pack—what are the distinctions

(Testimony of Victor Greco.)

in quality? How do you sell them? For instance, I own an orange grove, and I sell oranges fancy, which is—

A. (Interrupting.) The asparagus bean is called Fancy.

Q. No cut beans called Fancy?

A. Well, yes, and the end pieces, while they are the same bean, because they are not even cut, we just call them Standards, and sell the Standards at a reduced price.

Q. Do you mean to tell the Court that other canneries, not only yourself, but other canneries, do not cut Fancy string beans and pack Fancy string beans in the cut style? A. Yes, they do.

Q. What did they bring, a case, in the market, if you know? A. They will bring under \$4 a case.

Q. Do they bring \$4 a case? A. No.

Q. The Fancy? A. No, I do not think so.

Q. I only want what you know. A. No.

Q. They won't bring \$4? A. No.

Q. Do you pack the Fancy brand of cut beans?

A. No, all our Fancy beans are packed asparagus style.

Q. The only beans you pack in cut style are the ends you cut off the asparagus style beans?

A. Just calling them Standard, but they are the same thing.

Q. It is the same thing? A. Of course.

Q. But there is a Fancy quality of cut bean that brings a price in the market, and you don't know what the price is? A. Yes, there is.

(Testimony of Victor Greco.)

Q. You don't know about the price of anything but the kind you sell, Standards?

A. No, but I am familiar with the price.

Q. What are the prices to-day per case of big or large cut beans?

A. I don't know whether there are any in the market. Beans are scarce at the present time.

Q. There must be a market for them, isn't there?

A. I doubt whether any could be *hand*, but if any could be had the market would be about \$1.25.

Q. What were they last year, per case, not per dozen? A. About \$3 a case.

Q. Not more than \$3? A. Not more than \$3.

Q. You stand on that? A. Yes.

Q. But this year you don't know what the price was? A. This year we are not packing any.

Q. Don't you suppose other packers will be packing any?

A. They won't be packing until July, 1928.

Q. Ventura County, I suppose they will get some down there?

A. But they are not packing any beans at this time.

Q. In the year 1923, do you know anything about the price of Fancy cut pack beans?

A. In 1923 Fancy cut beans were sold from \$2.50 to \$3 a case. I am going to speak about cases, so that we don't get confused.

Q. I understand that they are two dozen to the case? A. Two dozen to the case.

(Testimony of Victor Greco.)

Q. Your beans of that year, the asparagus style, sold for \$4.50? A. \$4.50.

Q. In 1923 they sold for \$4.50 a case? A. Yes.

Q. Who did you sell any to?

A. All the jobbers, everybody.

Q. Just a minute, not everybody, because you did not sell to everybody, you know.

A. I mean everybody that buys beans.

Q. Just mention a few houses that you sold to at \$4.50 a case, a few important houses.

Mr. ARMSTRONG.—I can shorten this if counsel would stipulate to give us an account of who they sold beans to in 1923, 1924 at \$4 a case. Otherwise I am going to go down the list of jobbers.

Mr. LINN.—I don't know whether I mentioned the price of beans, at all. I don't think I did. But I do not see the materiality of it, even if I did mention it.

The MASTER.—You asked the witness the difference between asparagus style beans and the other beans, and the witness testified due to appearance he got \$4.50 a case. That is what counsel is cross-examining on.

Mr. ARMSTRONG.—I want to test the witness' recollection, too.

The MASTER.—It is within your right. It is perfectly relevant.

Mr. LINN.—We will furnish you with a list.

Mr. ARMSTRONG.—In 1922, 1923—

(Testimony of Victor Greco.)

A. (Interrupting.) I did not say 1922. I said 1923, 1924, and 1925.

Q. You said at \$4 a case to \$4.50 a case?

A. From \$4 to \$4.50 a case.

Q. Will you let me have all that you sold at \$4?

A. From \$4 to \$4.50 a case in 1923, 1924, and 1925.

Q. Does the fact whether or not you sell a man ten cases or a thousand cases make any difference in the price? A. It does.

Q. Will you let me have the quantities, too, the names of the jobbers, the quantity, and the price for those years? A. Yes.

TESTIMONY OF ANTHONY GRECO, FOR PLAINTIFF.

ANTHONY GRECO, called for the plaintiff, sworn.

Mr. LINN.—Q. Your full name?

A. Anthony Greco.

Q. Mr. Greco, you are the person who secured a patent on what we have referred to as the Greco mold? A. Yes, I am.

Q. Have you been in the canning business?

A. I have.

Q. How long? A. Four or five years.

Q. Since what year?

A. Since the year 1913, and up to the year 1920.

Q. Then you got out of business on account of your health? A. Yes.

(Testimony of Anthony Greco.)

Q. While you were in the canning business, you naturally were interested in the marketing of string beans, and the products that were on the market?

A. Most assuredly.

Q. When did you first see string beans canned asparagus style, either by yourself or by the Greco Manufacturing Company?

A. In the year 1916, as near as I remember.

Q. Your mold was used at that time?

A. It was then that I was inspired with the idea of this mold, and that method of packing.

Q. Prior to that time, were string beans so-called asparagus style? A. Never to my knowledge.

Q. Prior to the year 1922, if you know, were beans ever canned asparagus style by any other person or persons than the Greco Canning Company, or yourself?

Mr. ARMSTRONG.—Objected to, unless the witness gives some foundation for his knowledge, incompetent.

Mr. LINN.—Did you know, when you were in the canning business, or, rather, did you keep track of the product that was put on the market by different canneries?

A. I tried, as part of my business, to keep in touch with the situation.

Q. Then, as far as your knowledge goes, tell us whether or not, prior to the year 1922, any person other than the Greco Canning Company, or yourself, canned string beans asparagus style?

Mr. ARMSTRONG.—Objected to as calling for

(Testimony of Anthony Greco.)

the conclusion of the witness, no foundation laid for his ability to testify.

The MASTER.—Overruled.

Mr. ARMSTRONG.—Exception.

A. I am quite sure that there were no string beans canned asparagus style prior to that time. However, if my memory serves me right, I sold a license for \$2,000 to a man by the name of Ritz, but I never checked on the fact whether he had packed any, or not, but he did pay the money.

Mr. ARMSTRONG.—I move that that all go out as not responsive, and entirely irrelevant to any matter before us now.

The MASTER.—The motion is granted.

Mr. LINN.—No further questions.

Cross-examination.

Mr. ARMSTRONG.—Q. How long did you say you had been in the canning business?

A. From 1913 to about 1919 or 1920, I don't remember exactly.

Q. From 1913 to 1920, or 1919? A. Yes.

Q. What did you do after you left the canning business?

A. I was out as a fruit grower in the country.

Q. You are now a fruit grower? A. Yes.

Q. You have nothing further to do with the canning business? A. Not personally, no.

Q. You don't know anything that happened after 1920, so far as the canning business is concerned?

A. I don't know that I don't know anything that

(Testimony of Anthony Greco.)

happened, I am not as closely in touch with it as I was at the time.

Q. You don't know anything about it of your own knowledge; it is only what people tell you?

A. Yes.

Mr. LINN.—You want a list of the sales referred to?

Mr. ARMSTRONG.—Yes, 1923, 1924, and 1925.

Mr. LINN.—I would like to submit the files from the action in the Federal Court, and in this suit that I referred to, just to show the successive steps taken.

The MASTER.—You are entitled to anything that is in the files; simply by referring to it now, you can introduce anything you wish to.

Mr. LINN.—I will leave with the Master the transcript of the record in the present suit, the record on appeal.

Mr. ARMSTRONG.—There is also a supplementary transcript which I understand was filed after I left for New York.

Mr. LINN.—I will furnish that. That is just two depositions.

Mr. ARMSTRONG.—Those depositions are important on the question of comparison, as bearing on the state of the art.

Mr. LINN.—The other dates that I want are the dates of the suit brought by the Greco Canning Company against Anthony Greco, and against the San Jose Canning Company, to show that suit in 1922. That is what I want.

Mr. ARMSTRONG.—We have already got that. I reserve the right, if I see fit, to file the records in those suits that were spoken of.

The MASTER.—You do not have to file them; you can refer to them. If you tell me what you wish me to consider, that is open to you. They are on file.

[Endorsed]: Filed June 8th, 1928.

(Title of Court and Cause.)

SPECIAL MASTER'S OPINION AND ORDER ON STANDARD OF COMPARISON.

On September 1, 1926, the Master made his order for the filing of a sworn statement of account by defendant. On October 14, 1926, the account was filed. On January 12, 1928, plaintiff noticed a motion for the filing of a further account, conformable to the Master's order, to be heard on January 30, 1928. The parties appearing on that day, defendant filed a motion to amend the Master's order, and argument was heard on both motions. On January 31, 1928, the Master announced to the parties his opinion and order, in substance to the effect that before proceeding further the defendant should prove that hand packing of string beans asparagus style was a known alternative, open to defendant at the time of the infringement found by the decree, and a hearing on this issue was ordered and was had on February 27, 1928. At the request of the parties, the matter was submit-

ted at the close of the hearing on briefs to be filed at times stated. No briefs having been filed, the Master on May 2, 1928, notified the parties that defendant's brief should be filed on or before May 7, 1928, a date subsequently extended by the Master to May 9, 1928; plaintiff's reply to be filed on or before May 14th, and defendant's final brief on or before May 21, 1928. The defendant, on May 9th, filed a brief; plaintiff's brief was filed on May 18, 1928; it seems unnecessary to await defendant's reply.

The evidence taken shows that during the season in 1922 for packing string beans, which season begins each year toward the last of July, the defendant paid a royalty to plaintiff of \$500. At that time the application of Rancadore, general manager of defendant, for the mold later declared to be an infringement of the Greco mold of plaintiff was before the patent office. Toward the end of July, Mr. Rancadore asked one of his employees to get up a device which would facilitate hand packing of string beans asparagus style. The result was the model Exhibit 1. This is a block of wood around which at each end was bent and secured a piece of half-round iron, forming upwardly projecting arms within which a bunch of string beans could be placed on the block, after which the ends were trimmed off with a knife. The upwardly extending iron prongs fulfilled the function of gauging the quantity of beans to be packed in the can and of retaining them while the cutting was going on. The bunched string beans, after having

been trimmed, were then taken out of the device by hand and placed in the can. Defendant's manager, Mr. Rancadore, having tried this operation with some half dozen cans, did nothing further with it. In the seasons of 1923 and 1924 payment of royalty was refused, and defendant packed by the Rancadore mold, declared later to be an infringement.

During the seasons of 1925 and 1926 defendant packed by hand, using to facilitate hand packing the device in evidence as Exhibit 2. This is the same as Exhibit 1 except for the fact that the block projects at each end beyond the iron uprights, affording thus a surface to facilitate a clean cut with the knife.

The account which defendant has filed is based upon a comparison between the cost in filling the can with string beans by the use of the infringing mold and the cost of trimming the beans and filling the can by hand packing aided by Exhibit 2.

The facts stated are abundantly proved, with every evidence of plausibility and with no opposing evidence. It is not claimed that Exhibit 2 is an infringing device, and it seems obvious that it is not. The conclusion therefore follows that the hand packing method of defendant as described and as practiced in the seasons of 1925 and 1926 had been substantially developed by him as early as July, 1922; that he could have used hand packing aided by either Exhibit 1 or Exhibit 2 in the years 1923 and 1924 when he used the infringing mold, and that therefore this hand packing as prac-

ticed is a proper standard of comparison to be used in this accounting. The fact that there is a slight difference, as described, between Exhibit 1 and Exhibit 2, is immaterial. Exhibit 1 could have been used, but the modification by extending the block to facilitate cutting was obvious and a development that ensued naturally as soon as the method was put in practice.

Plaintiff's motion for a further statement, based as it is upon the theory that hand packing was not open to defendant, must be denied. No other grounds of objection have been presented that I know of.

It remains to rule on defendant's motion to amend the order for the account. The first item of defendant's motion is to insert in the order at line 23 the words "by means of the infringing mold," so that the requirement will be, "a sworn statement of account in debtor and creditor form of the profits made by you from canning string beans, packed asparagus style, by means of the infringing mold, during the year 1923," etc. This motion is granted.

Subparagraph (1) requires a statement of "the quantity of beans packed by you asparagus style and the amount of money paid therefor." If plaintiff were entitled to all the profits of defendant for beans packed asparagus style, this requirement might well enter into the accounting. Since, however, the method of packing in this way has not been sustained by the Circuit Court of Appeals, and since it is clear that it was open to defendant to

pack beans asparagus style, by hand, the only profits to be accounted for would seem to be dependent upon the cost of the packing by the infringing mold, as compared with the cost of hand packing. This is the theory of the account as filed, and as the Master is at present advised the theory is correct.

The next part of the motion is to cancel paragraph (4), as follows: "Cost of canning such beans, giving the items of such cost and the cost of each item," and to substitute therefor the words "cost of filling the cans by means of the infringing mold." The motion is granted.

It is next moved to cancel paragraphs 5, 6, and 7 of the order, reading as follows:

"(5) Cost of sale or marketing.

(6) Any other costs properly itemized.

(7) The profits derived by you in such business." and to substitute therefor the following: "cost of filling the cans by means of a standard of comparison." The profits to be accounted for seem plainly to be concerned solely with the cost of filling the cans, and since hand-packing was a proper standard of comparison, open at the time of the infringement, the change seems proper. The motion is granted.

There seems no reason why the preliminary stage of the accounting, having to do with preliminary discovery by defendant by the accepted method of filing a sworn statement of account, should not now be deemed complete, and why the main hearing on the accounting should not proceed. I will appoint Tuesday, June 5, 1928, at 10:00 o'clock A. M., at my

office room, 706, No. 68 Post Street, San Francisco, California, as the time and place for further hearing herein. The parties may then present such evidence as they see fit, to aid the Master in determining profits under the decree. If no such evidence is offered, I will report profits on the basis of defendant's account already filed.

The parties will advise me in advance if a reporter is likely to be required.

Dated May 21, 1928.

H. M. WRIGHT,
Special Master.

[Endorsed]: Filed June 8th, 1928.

Tuesday, June 5, 1928—2 P. M.

(At this time and at the same place, pursuant to order of the Special Master, the hearing in this matter was resumed, there being the same appearances, as follows:)

The MASTER.—It will be ordered that Erwin M. Cooper be appointed to report and transcribe the proceedings.

Mr. LINN.—I presume that your Honor will make your ruling of May 21, 1928, part of the record?

The MASTER.—Yes.

Mr. LINN.—To that ruling plaintiff wishes to enter his exception.

The MASTER.—Exception will be noted.

Mr. LINN.—And at this time plaintiff wishes, in order to make the record clear, if the Master is not already clear on that point, to prove by the wit-

ness Victor Greco that it is impractical to can string beans asparagus style by hand without the use of the device or devices in evidence known as Exhibit No. 1 and Exhibit No. 2 submitted by the defendant San Jose Canning Co.; in other words, we will prove that it is commercially impractical to can string beans by hand without the use of those two devices.

Mr. ARMSTRONG.—How is that material?

Mr. LINN.—In this respect, Mr. Armstrong: It is our earnest contention that the devices used, Exhibits 1 and 2, are not available as a standard of comparison, they not being available as a standard.

Mr. ARMSTRONG.—The Master has decided that, that it is a matter for the Court to take up.

The MASTER.—The decision is to the effect that the use of the devices, either Exhibits No. 1 or No. 2, as an auxiliary to packing string beans asparagus style by hand, was open to the defendant and is not an infringement—was open to him as a standard of comparison. I think it is quite clear on that point, Mr. Linn, that I did not contemplate that the account that has been given and the evidence that has been given as to the standard of comparison involved packing without some such device as Exhibit No. 1 or Exhibit No. 2.

Mr. LINN.—I understand that to be your Honor's ruling, but if our contention is successful, that devices 1 and 2, that is, the molds offered in evidence by the defendant known as Exhibits No. 1 and No. 2 should be held not to be available for use as a standard of comparison, then I want the record

to show that the packing of string beans by hand without the use of those devices is not commercially practical, and therefore we will revert back to the question of profit, perhaps at some future date, just for the purpose of the record.

Mr. ARMSTRONG.—I object to any such proof being offered, as that point has been closed and submitted, unless the Master sees fit to reopen it.

Mr. LINN.—Just for the purpose of making the record on that point, because we are relying now upon the Master's opinion and from that going on as a basis.

Mr. ARMSTRONG.—You can reopen it by testimony, if you have any, that has not been produced before.

Mr. LINN.—No, for this reason, that we proceeded before on the theory that this device was not available, that is, Exhibits Nos. 1 and 2, were not available as a standard of comparison. Now the Master has ruled that they are available as an aid to packing by hand.

Mr. ARMSTRONG.—The only question left is the accounting.

Mr. LINN.—If we should except to the Master's final ruling in this matter, we want the District Court to be in a position from this record to say whether or not packing by hand without the use of these devices is available as a standard of comparison.

The MASTER.—I will let you make that proof. I doubt if it is material because there is no evidence

(Testimony of Victor Greco.)

that it was so packed. If you want that in the record you may have it.

Mr. LINN.—You will not be willing to stipulate to that?

Mr. ARMSTRONG.—No.

The MASTER.—You have made an objection; it has been overruled and exception noted.

Mr. ARMSTRONG.—If the objection is going to be ruled on I want to state it more specifically. I object to it on the ground that it is entirely immaterial and as a consequence incompetent. There is nothing before the Master at this time on which to accept evidence that would be applicable or in any way material or relevant, and the whole line of testimony is incompetent.

The MASTER.—Objection overruled.

Mr. ARMSTRONG.—I except to the ruling.

TESTIMONY OF VICTOR GRECO, FOR
PLAINTIFF (RECALLED).

VICTOR GRECO, recalled.

Mr. LINN.—Q. How long have you been engaged in the canning of vegetables? A. Since 1913.

Q. You are familiar with the manner in which vegetables are packed and can be packed?

A. I am.

Q. What has been your position in the Greco Canning Company?

A. President and general manager.

Q. As such you have been actively in charge of the supervision of the canning operations of that company? A. I have.

(Testimony of Victor Greco.)

Q. And that company is engaged in the canning of vegetables of all kinds, including string beans?

A. Oh, yes, sir.

Q. From your knowledge of the canning industry and particularly the canning of vegetables and string beans asparagus style, can you state whether or not string beans can be canned in the manner known as the asparagus style by hand without the aid of some device such as Exhibits 1 and 2 in evidence here?

Mr. ARMSTRONG.—Just a moment. I object to that on the ground it is incompetent, no foundation laid; the president, manager or superintendent does not have to know anything about the mechanical process of canning.

The MASTER.—Overruled.

A. No, they cannot be packed by hand; it is impractical.

Mr. LINN.—Why is it impractical?

Mr. ARMSTRONG.—I think that is argumentative.

Mr. LINN.—It is part of the cross-examination.

The MASTER.—Objection sustained.

Mr. LINN.—That is all.

Cross-examination.

Mr. ARMSTRONG.—Q. Mr. Greco, did you ever can beans, go through the process of canning beans, asparagus style yourself?

A. For a number of years I did my own packing.

Q. I mean asparagus style. A. Yes.

(Testimony of Victor Greco.)

Q. At that time you used your mold, did you not, when you packed yourself.

A. I had to pack them by hand before I had the mold, and had to discontinue that.

Q. That means you personally did not pack by hand? A. I did with my assistants.

Q. Who were your assistants?

A. The girls in the cannery.

Q. How many girls did you have working in the cannery.

A. 60 or 75. I am referring back to 1914, as far back as that.

Q. That is all right, and then coming along those years, did you ever try to pack by hand?

A. No, due to the fact we were not successful and not being able to pack by hand. That is how the molds originated; that is how we struck the idea of establishing that device or creating that device.

Q. Then, you would say it was absolutely impossible to pack beans asparagus style, by hand.

A. Yes, it is absolutely impossible because it is commercially impractical.

Q. Prior to your commencing to pack beans in the so-called asparagus style you knew that other vegetables were packing in that way, did you not; you had seen other vegetables packed that way?

A. There are other vegetables packed that way except asparagus.

Q. And you knew that they had been packed that

(Testimony of Victor Greco.)

way for 40 or 50 years prior to your engaging in packing beans. A. Yes, but—

Q. Just a moment. And except that the caliber of the asparagus is a little larger and the asparagus itself a little firmer and stiffer, those were for many years packed by hand, were they not? A. Yes.

Q. And later on, Sperry and others developed molds; is that not a fact?

A. I don't know about that.

Q. You know that Sperry, one of the largest asparagus packers, used the molds introduced in evidence in this case? A. No, I don't know that.

Q. Were you present during all of the hearing here? A. No.

Q. Have you looked at any exhibits offered in this case, besides your own mold? A. Yes.

Q. Did you look at that mold of tin which is something like a cuff that the women wear with the switch down the center?

A. No, I did not look at it because I did not see one.

Q. You did not see that?

A. No, I don't believe there was any offered.

Q. Have you ever tried since 1914 to pack beans asparagus style by hand without any matrix?

A. Since 1914?

Q. Yes.

A. I can't say that I have; I have had no occasion to try it.

Q. Is it the fact that they cannot measure a

(Testimony of Victor Greco.)

sufficient quantity of beans to put in a can that makes it impossible to pack by hand?

A. Not totally.

Q. What makes it impossible to pack by hand?

A. The fact that they are very limber.

Q. And you cannot take two hands and pick up limber products and pack them in a receptacle?

A. Yes, but without cutting them, they will not mate. The trade recognizes what they ought to have, and because they are limber you do not get the asparagus straight.

Q. Why are not the hands just as valuable for pressing together a number of them and dropping them into a receptacle as a machine?

A. Because you cannot get your hand in the can.

Q. Then, your idea is that the only objection, the only fault or defect in packing by hand is that without a machine they cannot be put in a can straight enough to make a commercial product?

A. That is one idea, not the only idea.

Q. What are the other ideas?

A. You do not get them in the can as tight; you do not cut them uniform; you do not get them in the can straight.

Q. But nevertheless they can be canned that way?

A. Not commercially. It is not practical. You might build an automobile by hand but can you sell it? You need a lot of machinery to build an automobile with.

Mr. ARMSTRONG.—That is argumentative. I move that go out.

(Testimony of Victor Greco.)

The MASTER.—Stricken out.

Mr. ARMSTRONG.—Q. In 1914, when you experimented, the idea of packing the beans that style was new, was it not; did you pack them in that style in 1914?

A. In 1914 it occurred to me to pack beans asparagus style. In 1915 we did the same thing. Then in 1916, we devised the idea of a mold.

Q. And did you use the mold in 1916? A. Yes.

Q. And packed beans asparagus style in 1916?

A. Yes, and have ever since.

Q. How many cans did you try out in 1914?

A. I could not remember the number of cans, but tried it over a period of time, tried it from day to day.

Q. You are testifying very positively as to what can and what cannot be done. In 1914 about how many cans did you and your assistants experiment with?

A. That is a rather difficult question to answer because the question is not right.

Mr. ARMSTRONG.—I move that that go out and that he answer the question.

The MASTER.—Strike it out. Say you do not know, if you do not know.

A. I don't know about how many cans. Of course—

Mr. ARMSTRONG.—I do not want—

Mr. LINN.—I ask that the witness be allowed to explain his answer.

(Testimony of Victor Greco.)

Mr. ARMSTRONG.—He can explain it afterwards.

Q. In 1915, how many cans did you experiment with?

A. I don't know exactly how many cans, but we tried over a period of several days. We may have packed several hundred and we may have packed several thousand.

Q. Did you pack several thousand in 1915 asparagus style?

A. Tried to pack them but they were not right.

Q. Have you any record or books for the years 1914 and 1915 that show your cost of packing or attempted packing?

A. We have records, but we have no record of an experiment, if you put something in a can and dump it out.

Q. Do your records show the cost of the beans that were dumped out in these experiments?

A. No, because that would go into general labor.

Q. All go into labor? A. Yes.

Q. And charged against your general product; you do not keep any special cost account?

A. We do in certain instances. We did not at that time because this was experimental.

Q. In 1914, how many pounds of beans did you dump as the result of these experiments?

A. I cannot remember that far back. We may have packed a ton or two.

Q. How many girls did you have in your employ

(Testimony of Victor Greco.)

at that time packing, not working on string beans asparagus style? A. We may have had 50 or 60.

Q. Just trying on this one thing?

A. Trying to work at that, not working.

Q. And each of these 50 girls did about how many cans?

A. They filled a lot of cans and dumped them out again, trying to get them right, and we could not do it.

Q. It never occurred to you at that time to have a measure to measure the amount?

A. No, it occurred to us later. It occurred to us in 1915, when we made another experiment.

Q. And since 1915, you have made no experiment to pack beans asparagus style, by hand?

A. Since 1915, I have not.

Mr. ARMSTRONG.—That is all.

Redirect Examination.

Mr. LINN.—Q. Mr. Greco, the use of a device similar to the ones in evidence, Exhibits 1 and 2, and also the other devices, your patented device and the device that Mr. Rancadore attempted to pack with?

Mr. ARMSTRONG.—Did pack with.

Mr. LINN.—Q. Did pack with and it was later declared to be an infringement; is that device of any aid or assistance in the measuring of the length of the bean?

Mr. ARMSTRONG.—That is objected to unless he qualifies by having used that device; otherwise it calls for a mere conclusion.

(Testimony of Victor Greco.)

Mr. LINN.—As an expert, I am asking for his conclusion.

Mr. ARMSTRONG.—I am entitled to know whether he ever tried it or not. Otherwise it is incompetent and calls for a conclusion.

The MASTER.—Overruled.

A. It is considerable assistance.

Mr. LINN.—Q. And that is one of the elements which is lacking, is it not in the packing of the string beans by hand, that is, the ability to cut them all to an even length?

A. Yes.

Q. Mr. Greco, when you referred to dumping these string beans, a ton of them by that you mean you dumped them out of the cans and then were able to use them by slanting them up in the old method?

A. That was all dependent on the care they were subjected to in handling. What we could salvage we cut and used. What we could not salvage, which was too broken up at that time, we dumped and threw in the garbage can and threw them away.

Recross-examination.

Mr. ARMSTRONG.—Q. You are satisfied then, that without this device, it would be impossible to measure the beans for cutting in order to pack by hand; that is your testimony?

A. Without which device?

Q. Defendant's Exhibits 1 and 2.

(Testimony of Victor Greco.)

A. Unless you used a rule. You could use a rule and measure it and cut it.

Q. You could mark out two lines on a packing table and put the beans between those and cut them, could you not? A. Yes.

Further Redirect Examination.

Mr. LINN.—Q. Mr. Greco, putting beans on a packing table with two lines at a fixed distance apart and cutting the beans, what about that as a practical proposition?

A. Absolutely impractical; it would be commercially impractical.

Mr. LINN.—No further questions.

Mr. ARMSTRONG.—I am through with the witness.

Mr. LINN.—No further testimony on that subject at all.

As far as this account is concerned, the sworn statement of account produced by the defendant, we do not wish to offer any testimony at all except a question or two of Mr. Rancadore in the nature of cross-examination.

Mr. ARMSTRONG.—The witness Rancadore has already been sworn.

TESTIMONY OF I. RANCADORE, FOR DEFENDANT (RECALLED).

I. RANCADORE, recalled.

Mr. LINN.—Q. I am now referring to the sworn statement of account, which purports to have been

(Testimony of I. Rancadore.)

sworn to by you on the 14th day of October, 1926, and which is on file before his Honor, the Special Master, and shows a saving to the defendant incident to the infringement for the years 1923 and 1924 of \$663.19.

Mr. ARMSTRONG.—What page is that on?

Mr. LINN.—The last page, the recapitulation. This is just for the purpose of identification, that is all.

Q. Mr. Rancadore, you are familiar with the books of your concern? A. Yes, sir.

Q. Are these figures taken from those books?

A. The sales figures are, yes, the amount of string beans packed asparagus style.

Q. Those figures only, are taken from your books?

A. From the invoices.

Q. The computation of the saving is not taken from your books? A. No, sir.

Q. How did you arrive at that?

A. That is what we were paying.

Q. That is what you were paying?

A. The amount we were paying before and the amount paid afterwards.

Q. Was that taken from your books?

A. We do not keep them in our books; nobody does. The only thing we keep in the books, is the pay-roll that we pay out every week.

Q. Did you pay by piece work?

A. Yes. We have cards for that but after a couple of years, they are destroyed because they

(Testimony of I. Rancadore.)

accumulate too much. We only keep the cards 2 years.

Q. And that is the way you arrived at these figures? A. Yes, sir.

Q. The difference in the price you paid the girls canning with the use of the— A. Mold.

Q. —the infringing mold and the price you paid them using devices 1 and 2. A. Yes, sir.

Mr. LINN.—That is all.

Mr. ARMSTRONG.—That is all. So far as the method of profits is concerned, the account will stand?

Mr. LINN.—So far as I am concerned on the question of accounts, the matter may be taken as stated there, and of course, I am still firm in my original contention that Exhibits 1 and 2 are not available.

The MASTER.—There is no question that this will be in evidence as part of this hearing.

Mr. ARMSTRONG.—If your Honor has any doubt about it, I move that it be made a part of the evidence and offered in evidence as an exhibit on the part of the defendant.

The MASTER.—It is in evidence and the evidence will stand submitted.

Mr. LINN.—Nothing further, unless your Honor would want further briefs.

The MASTER.—The usual procedure when a report is made is that an opportunity is given to the parties to file objections. I do not see that that procedure should be gone through; it will take time.

It can be waived. The reports will be made final and you could make your objections and have them heard before the Court. It will save time before the vacation.

Mr. LINN.—That will be satisfactory.

The MASTER.—All right. It will be submitted.

[Endorsed]: Filed June 8th, 1928.

(Title of Court and Cause.)

SPECIAL MASTER'S REPORT ON ACCOUNT-
ING OF PROFITS.

To the Honorable the Judges of the Above-entitled
Court:

By the interlocutory decree herein filed and entered June 23, 1925, it was adjudged "that said plaintiff is entitled to an accounting of the profits made by said defendant as a result of said infringement of said patent and patent rights for the years beginning with and including the year 1923 down to the present time," and the undersigned was by said decree appointed Special Master to take and report the evidence, together with my findings and conclusions thereon. It is to be noted that although the statute allows a plaintiff damages as well as profits, a requirement which has been interpreted as giving to the plaintiff whichever shall be the greater, the decree as framed makes no mention of damages; and the Master, accordingly, has no authority except to find profits. This point has

been called to the attention of the parties, and is understood and apparently acquiesced in.

The proceedings before me follow.

(1) On June 26, 1925, the Master signed an order for a statement, under Rule 63, presented by plaintiff. There is no proof in my files that said order was served, nor was the original returned. Meanwhile an appeal had been taken from the interlocutory decree, and on January 18, 1926, 10 Fed. (2d), page 100, the Circuit Court of Appeals affirmed the decree below as to infringement of claims covering the device but reversed it as to claims covering the method of packing, stating that this method was nothing more than the obviously necessary manner of operating the mechanism.

(2) On September 1, 1926, the Master signed a second order for filing of an account under Rule 63, presented by plaintiff and substantially similar to the one issued in 1925. This order is separately returned.

(3) On October 14, 1926, defendant filed its sworn statement of account, preceded by an extended argument. This account was at the final hearing formally introduced by defendant in evidence, and is separately returned.

(4) Thereafter plaintiff noticed a motion for January 30, 1928, for a further sworn statement of account under Rule 63, and on that date defendant presented a motion for modification of the order of September 1, 1926. The above two notices of motion are herewith separately returned. Argument was had on said day, Clarence A. Linn, Esq., ap-

pearing for plaintiff and A. Schapp, Esq., appearing for defendant.

(5) Thereafter, on January 31, 1928, the Master signed an opinion and order, which is annexed to this report, briefly to the effect that evidence was needed to determine what standard of comparison was open to defendant, and a hearing was ordered for February 27, 1928, on that question.

(6) On February 27, 1928, I was attended by the parties, Clarence A. Linn, Esq., appearing for plaintiff, R. M. J. Armstrong, Esq., and A. Schapp, Esq., appearing for defendant, and evidence was taken on the question of the available standard of comparison, which evidence, contained in a pamphlet volume marked "Volume 1" in 57 pages and in two physical exhibits, defendant's exhibits 1 and 2, is herewith separately returned.

(7) Following this hearing briefs were filed, by the defendant on May 9, 1928, and by the plaintiff on May 18, 1928. Thereafter, on May 21, 1928, the Master signed and filed his opinion and order on the question of the standard of comparison, which order is annexed to this report and, with the first opinion referred to, is to be considered a part thereof. Briefly, it was decided that hand packing aided by either Exhibit 1 or Exhibit 2 was available to defendant as a standard of comparison in 1923 and 1924; plaintiff's motion for a further statement of account being denied and defendant's motion to amend the order being granted. June 5, 1928, was appointed as the time for further evidence to determine profits.

(8) On June 5, 1928, I was attended by the parties, Clarence A. Linn, Esq., appearing for plaintiff and R. M. J. Armstrong, Esq., and A. Schapp, Esq., appearing for defendant. Evidence was taken, which was stenographically reported, and is herewith separately returned as Volume 2. The matter was thereupon submitted without further argument, and it was stipulated by the parties that the provision of Rule 114 of this court providing for the announcement of the report in draft, with opportunity to the parties to file objections with the Master, should be waived; and that the Master's report when ready should be signed and filed as his final report, subject to exceptions to be filed with the Clerk.

The above statement is a full statement of the proceedings before me in this accounting, and the statement made of the evidence received and returned covers all the evidence upon which this report is based.

Responding to the directions in the interlocutory decree, I conclude and report as follows:

1. Defendant's profits, being its savings by reason of the infringement found by the decree, amount to the sum of \$662.19, for which sum plaintiff should have the final decree of this Court against defendant.

2. In addition to said sum, plaintiff should recover interest thereon at the rate of 7% per annum, beginning January 1, 1925, being approximately the close of the infringing period, to date of the final decree herein, and interest thereafter on the amount

of the total profits and accrued interest, at the same rate, until said judgment and decree is paid.

The above is hereby settled, signed and filed as my final report herein, and the parties notified of said action by mail, this 8th day of June, 1928.

H. M. WRIGHT,
Special Master.

(Title of Court and Cause.)

EXCEPTIONS TO SPECIAL MASTER'S REPORT.

Now comes the plaintiff above named, and files his exceptions to the report of the Special Master on file herein, and for his grounds of exceptions specifies:

1. Plaintiff excepts to the ruling of the Special Master holding that the hand packing of string beans asparagus style, aided by either Exhibit 1 or Exhibit 2, was available to defendant as a standard of comparison in 1923 and 1924, for the reason that the evidence taken before the Special Master discloses that the hand packing of string beans asparagus style, aided either by Exhibit 1 or Exhibit 2, was not available to the defendant as a standard of comparison in 1923 and 1924.

2. Plaintiff excepts to that portion of the Special Master's report awarding plaintiff damages based upon the saving of defendant by reason of the infringement, using as a basis for such finding of damages the standard of comparison heretofore referred to.

WHEREFORE, plaintiff prays that the report of the Special Master be not confirmed, and that this matter be re-referred to the Special Master for the purpose of ascertaining the profits realized by defendant by reason of the infringement complained of, and for such other relief as may be meet and just in the premises.

ROBERT DUNCAN,
CLARENCE A. LINN,
Attorneys for Plaintiff.

Receipt of a copy of the within exceptions to Special Master's report admitted this 27th day of June, 1928.

A. SCHAPP,
Attorney for San Jose Canning Company.

[Endorsed]: Filed June 28th, 1928.

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the city and county of San Francisco, on Wednesday, the 7th day of November, in the year of our Lord one thousand nine hundred an twenty-eight. Present: The Honorable FRANK H. KERRIGAN, District Judge.

(Title of Cause.)

MINUTES OF COURT—NOVEMBER 7, 1928
—ORDER OVERRULING EXCEPTIONS
TO SPECIAL MASTER'S REPORT.

Plaintiff's exceptions to the Master's report on accounting of profits heretofore argued and submitted, being now fully considered it is ordered that said exceptions be and they are hereby overruled, and that said report be and the same is hereby confirmed.

[Endorsed]: Entered Nov. 7, 1928.

(Title of Court and Cause.)

EXCEPTION TO ORDER OVERRULING
PLAINTIFF'S EXCEPTIONS AND AF-
FIRMING REPORT OF SPECIAL
MASTER.

The plaintiff Louis Oneal hereby excepts to the ruling of the Court made herein on the 7th day of November, 1928, wherein his exceptions to the Master's report on accounting of profits were overruled and the said report affirmed.

Dated: November 8th, 1928.

ROBERT DUNCAN,
CLARENCE A. LINN,
Attorneys for Plaintiff.

[Endorsed]: Filed November 9, 1928.

In the United States District Court of the Northern
District of California, Southern Division.

No. 1307—IN EQUITY.

LOUIS ONEAL,

Plaintiff,

vs.

SAN JOSE CANNING COMPANY, a Corpora-
tion,

Defendant.

DECREE.

This cause came on to be heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz.:

That plaintiff, Louis Oneal, have and recover of the defendant, San Jose Canning Company, a corporation, the sum of \$662.19, together with interest thereon at the rate of seven per cent (7%) per annum, beginning January 1, 1925, and costs of suit taxed at \$130.16.

Dated: Nov. 28, 1928.

FRANK H. KERRIGAN.

[Endorsed]: Filed and entered Nov. 28, 1928.

(Title of Court and Cause.)

STIPULATION AND ORDER RE STATE-
MENT OF EVIDENCE TO BE USED ON
APPEAL.

It is hereby stipulated and agreed by and between the parties hereto that the transcript of proceedings herein had before the Special Master H. M. Wright, Esq., together with the Special Master's report, the opinions annexed thereto and the exhibits referred to therein contain a true, full and correct statement of the evidence essential to the decision of the questions presented on the appeal herein.

It is further stipulated and agreed by and between the parties hereto that said transcript of proceedings, together with the Special Master's report, the opinions annexed thereto and the exhibits referred to therein may be settled and allowed as the statement of the evidence herein and to be used as a part of the record on appeal.

Dated: December 6th, 1928.

CLARENCE A. LINN,
ROBERT DUNCAN,

Attorneys for Plaintiff and Appellant.

R. M. J. ARMSTRONG,
A. SCHAPP,

Attorneys for Defendants and Appellee.

Pursuant to the foregoing, IT IS SO ORDERED.

Dated: December —, 1928.

FRANK H. KERRIGAN,
United States District Judge.

[Endorsed]: Filed Dec. 19th, 1928.

(Title of Court and Cause.)

NOTICE OF APPEAL.

To the Defendant, San Jose Canning Company, a Corporation, and to the Clerk of the Above-entitled Court:

Please take notice that the plaintiff, Louis Oneal, does hereby appeal from the judgment and decree made and entered herein on the 28th day of November, 1928, to the United States Circuit Court of Appeals for the Ninth Circuit.

CLARENCE A. LINN,
ROBERT DUNCAN,
Attorneys for Plaintiff and Appellant.

IT IS ORDERED that the bond on appeal in the above matter be fixed at the sum of \$250.00.

Dated: December —, 1928.

FRANK H. KERRIGAN,
United States District Judge.

[Endorsed]: Filed Dec. 19, 1928.

(Title of Court and Cause.)

ASSIGNMENT OF ERRORS

Now comes the plaintiff and appellant in the above-entitled cause and files the following assignment of errors upon which he will rely upon his prosecution of the appeal in the above-entitled cause, from the judgment and decree made by this Honorable Court on the 28th day of November, 1928.

I.

That the Court erred in overruling the plaintiff's exceptions to the Special Master's report on Accounting of profits.

II.

That the Court erred in confirming the Special Master's report on accounting of profits.

III.

That the Court erred in ruling that the hand packing of string beans asparagus style, aided by either Exhibit 1 or Exhibit 2 (in evidence before the Special Master) was available to defendant as a standard of comparison in 1923 and 1924, for the reason that the evidence taken before the Special Master and transmitted to the Court discloses that the hand packing of string beans asparagus style, aided by either said Exhibit 1 or said Exhibit 2 was not available to the defendant as a standard of comparison in 1923 and 1924.

IV.

That the Court erred in awarding plaintiff dam-

ages based upon the saving of defendant by reason of the infringement, using as a basis for such finding of damages the standard of comparison heretofore referred to instead of awarding plaintiff such damages based upon the entire profits of defendant derived from the packing of string beans asparagus style by use of the infringing device, there being no hand operation for such packing then known.

WHEREFORE, the plaintiff and appellant prays that said decree be reversed.

CLARENCE A. LINN,

ROBERT DUNCAN,

Attorneys for Plaintiff and Appellant.

[Endorsed]: Filed December 18, 1928.

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO TRANSCRIPT OF RECORD.

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing 147 pages, numbered from 1 to 147 inclusive, to be a full, true and correct copy of the record and proceedings as enumerated in the praecipe for record on appeal, as the same remain on file and of record in the above-entitled suit, in the office of the Clerk of said court, and that the same constitutes the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is \$62.70; that the said amount

was paid by the plaintiff and that the original citation issued in said suit is hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 7th day of February, A. D. 1929.

[Seal] WALTER B. MALING,
Clerk United States District Court for the Northern District of California.

CITATION ON APPEAL.

United States of America,—ss.

The President of the United States, to San Jose Canning Company, a Corporation, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's office of the United States District Court for the Northern District of California, Southern Division, wherein Louis Oneal is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable FRANK H. KERRIGAN, United States District Judge for the North-

ern District of California, this 8th day of January,
A. D. 1929.

FRANK H. KERRIGAN,
United States District Judge.

Due service and receipt of a copy of the within
citation on appeal admitted this 10th day of Janu-
ary, 1929.

R. M. J. ARMSTRONG,
A. SCHAPP,
Attorneys for Appellee.

[Endorsed]: Filed Jan. 11, 1929.

[Endorsed]: No. 5714. United States Circuit
Court of Appeals for the Ninth Circuit. Louis
Oneal, Appellant, vs. San Jose Canning Company,
a Corporation, Appellee. Transcript of Record.
Upon Appeal from the United States District
Court for the Northern District of California,
Southern Division.

Filed February 7, 1929.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Ap-
peals for the Ninth Circuit.

United States Circuit Court of Appeals, Ninth
Circuit.

No. 5714.

LOUIS ONEAL,

Appellant,

vs.

SAN JOSE CANNING CO., a Corporation,
Appellee.

REQUEST AS TO PRINTING OF RECORD.

To the Clerk of the Above-entitled Court:

Please print the transcript of the record in the
above-entitled cause in the following order:

1. Amended Bill of Complaint.
2. Amended Answer.
3. Interlocutory Decree.
4. Order Modifying Interlocutory Decree.
5. Order (page 22).
6. Sworn Statement of Account (page 99).
7. Notice of Motion for Further Accounting
(page 96).
8. Notice of Motion to Amend Order.
9. Master's Opinion and Order (page 124).
10. Transcript of Proceedings Before Special
Master (pages 24 to 80).
11. Special Master's Opinion and Order on Stand-
ard of Comparison (page 130).
12. Transcript of Proceedings before Special
Master (pages 81 to 95).

13. Special Master's Report on Accounting of Profits (page 120).
14. Exceptions to Special Master's Report (page 135).
15. Order Overruling Same (page 137).
16. Exceptions to Order Overruling (page 138).
17. Decree (page 139).
18. Stipulation and Order (page 140).
19. Notice of Appeal (page 141).
20. Assignment of Errors (page 142).
21. Certificate of Clerk (page 148).
22. Citation (page 149).

Respectfully,
CLARENCE A. LINN,
Solicitor for Appellant.

Receipt of a copy of the within request as to printing of record is admitted this 18th day of February, 1929.

A. SCHAPP,
Attorney for Appellee.

[Endorsed]: Filed Mar. 8, 1929. Paul P. O'Brien, Clerk.

14
No. 5714

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

LOUIS ONEAL,

Appellant,

VS.

SAN JOSE CANNING COMPANY
(a corporation),

Appellee.

BRIEF FOR APPELLANT.

CLARENCE A. LINN,

Mills Building, San Francisco,

Attorney for Appellant.

FILED

MAY 24 1932

PAUL P. O'BRIEN,

CLERK

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No. 5714

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LOUIS ONEAL,

Appellant,

VS.

SAN JOSE CANNING COMPANY

(a corporation),

Appellee.

BRIEF FOR APPELLANT.

Appellant sued to enjoin defendant from infringing on a patent covering a device for and process of canning string beans. The patent was sustained *in toto* by the District Court, but on appeal the process patent was held void, but the patent on the device was upheld. (*San Jose Canning Company v. Oneal*, 10 Fed. (2) 100.)

Thereupon, the District Court referred the matter to a special master to determine the profits derived by appellee by reason of its use of appellant's device, and to report to the court.

Appellant's contention before the special master is briefly stated in the master's opinion and order of January 31, 1928:

“The complainant’s contention, on the other hand, is that the packing of string beans, whole, lengthwise in the can, in the manner of asparagus stalks was not known in the art until plaintiff’s device, two semi-circular molds with certain accessories, which bunch the beans and facilitate their insertion into the cans, created that particular style of packing; that prior thereto, string beans were not packed asparagus style by hand, but were packed cut up into pieces. Plaintiff’s contention, accordingly, is that the selected standard of hand packing is not applicable under the law and that plaintiff is entitled to the entire profits of defendant for beans packed by the infringing device in the asparagus style originated by plaintiff, there being no hand operation for such packing then known.

“It is, of course, settled law that a device or method not known at the time of the infringement is not available as a standard of comparison, 277 Federal, 177; Walker, Section 725. If plaintiff is correct on the facts, his claim that he is entitled to all the profits of beans packed asparagus style, without reference to any standard of comparison, would seem on my present understanding to be correct.” (Record, p. 60.)

This quotation not only tersely states the contention but the law applicable thereto.

Thereafter, a hearing was had to ascertain whether or not there was a “standard of comparison” available to appellee. On May 21, 1928, the special master rendered an opinion on the question of “standard of comparison” in which he summarized the facts as follows:

“The evidence taken shows that during the season in 1922 for packing string beans, which season begins each year toward the last of July, the defendant paid a royalty to plaintiff of \$500. At that time the application of Rancadore, Gen-

eral Manager of defendant, for the mold later declared to be an infringement of the Greco mold of plaintiff was before the patent office. Toward the end of July, Mr. Rancadore asked one of his employees to get up a device which would facilitate hand packing of string beans asparagus style. The result was the model Exhibit 1. This is a block of wood around which at each end was bent and secured a piece of half-round iron, forming upwardly projecting arms within which a bunch of string beans could be placed on the block, after which the ends were trimmed off with a knife. The upwardly extending iron prongs fulfilled the function of gauging the quantity of beans to be packed in the can and of retaining them while the cutting was going on. The bunched string beans, after having been trimmed, were then taken out of the device by hand and placed in the can. Defendant's manager, Mr. Rancadore, having tried this operation with some half dozen cans, did nothing further with it. In the seasons of 1923 and 1924 payment of royalty was refused, and defendant packed by the Rancadore mold, declared later to be an infringement.

During the seasons of 1925 and 1926, defendant packed by hand, using to facilitate hand packing the device in evidence as exhibit 2. This is the same as Exhibit 1 except for the fact that the block projects at each end beyond the iron uprights, affording thus a surface to facilitate a clean cut with the knife.

The account which defendant has filed is based upon a comparison between the cost in filling the can with string beans by the use of the infringing mold and the cost of trimming the beans and filling the can by hand packing aided by Exhibit 2.

The facts stated are abundantly proved, with every evidence of plausibility and with no opposing evidence. It is not claimed that Exhibit 2 is an infringing device, and it seems obvious that it is not. The conclusion therefore follows that the

hand packing method of defendant as described and as practiced in the seasons of 1925 and 1926 had been substantially developed by him as early as July 1922; that he could have used hand packing aided by either Exhibit 1 or Exhibit 2 in the years 1923 and 1924 when he used the infringing mold, and that therefore this hand packing as practiced is a proper standard of comparison to be used in this accounting. The fact that there is a slight difference, as described, between Exhibit 1 and Exhibit 2, is immaterial. Exhibit 1 could have been used, *but the modification by extending the block to facilitate cutting was obvious and a development that ensued naturally as soon as the method was put in practice.*" (Record, p. 136.)

At a later hearing the witness Victor Greco testified that it was commercially impractical to pack string beans "asparagus style" without the use of appellant's patented device or some such mold as was used by appellee and considered by the special master as a standard of comparison. (Testimony of V. Greco, Record, p. 144.)

The same witness testified that never prior to 1922 did any one other than appellant's assignors pack string beans "asparagus style." This testimony is uncontradicted. (Testimony of V. Greco, Record, p. 123, et seq.)

The special master in his final report adopted the "standard of comparison" herein referred to, and assessed damages accordingly, to which ruling appellant has filed his exceptions. The report of the special master was affirmed and judgment entered accordingly.

ASSIGNMENT OF ERRORS.

Appellant contends that the law was correctly stated by the special master in his first ruling, quoted herein (and the special master has not reversed that ruling); that the special master has correctly stated the facts (as quoted above); but, in drawing his conclusions therefrom and in applying the law thereto, he has fallen into error, and that the District Court has erred in affirming the report of the special master.

ARGUMENT.

In order for a "standard of comparison" to be available to an infringer, it must be

" 'Then open to the public,' *Mowry v. Whitney*, 81 U. S. (14 Wall.) 620, 20 L. Ed. 860; 'in common use.' *Black v. Thorne*, 111 U. S. 122, 4 Sup. Ct. 326, 28 L. Ed. 372; 'known and in general use anterior to date of the patent,' *Sessions v. Romadka*, 145 U. S. 29, 12 Sup. Ct. 799, 36 L. Ed. 609; 'common and unrestricted use,' *Locomotive Safety Truck Co. v. P. R. Co.* (C. C.) 2 Fed. 677; 'free to everybody,' *National Car-Brake Shoe Co. v. Terre-Haute Car & Mfg. Co.* (C. C.) 19 Fed. 514; 'open to the defendants,' *Wales v. Waterbury Mfg. Co.*, 101 Fed. 126, 41 C. C. A. 250; 'known prior to complainant's invention,' *Fulleton Walnut Growers' Ass'n v. Anderson-Barn Grover Mfg. Co.*, 166 Fed. 443, 92 C. C. A. 295; 'gone into public use,' *Novelty Glass Mfg. Co. v. Brookfield*, 170 Fed. 946, 95 C. C. A. 516; 'open to the world,' *Cambria Iron Co. v. Carnegie Steel Co.*, 224 Fed. 947, 140 C. C. A. 437."

American Pneumatic Service Co. v. Snyder, 241 Fed. 274, 275.

The proposed "standard of comparison" was made in July, 1922, one night after work had ceased. The manager of appellee, one of his workmen (not one engaged in canning), and an employee of appellant's assignor, who was secretly aiding appellee, and under the compulsion of a threat of injunction met, and the result of the meeting was Model No. One, introduced before the special master.

"Q. Do you remember the packing season of 1922?

A. Yes.

Q. In 1922 did you **experiment** with packing beans in bunch form, so-called asparagus style?

A. Yes.

Q. Will you explain to the Court just what you did at that time, and, if possible, about the time in 1922 when you did it?

A. It was in the latter part of July, that is, when we got started packing string beans. I worked under a license from Anthony Greco.

Q. In 1922?

A. In 1922, and as soon as we got started packing string beans, I was wondering if something could be accomplished by hand without using any mold of any kind, so I told my assistant superintendent, Mr. Cusimano, to try and get up a form so that it would hold enough beans in there to fit into a can, and we tried several forms, and we finally got enough beans in this form to fit the No. 2 cans. This is the kind that we generally use in packing our string beans, except these are a little higher.

Q. That is the form, except the uprights were a little higher?

A. They were higher before. *So we tried it and about half a dozen cans were packed*, and we saw we could fit them exactly as the mold did, make a very good pack; more beans go into a can with that than with a mold, due to the fact that the mold is a little bit narrower than the can,

itself. In bunch form, we could put in as much beans as the cans will hold. Naturally, if the girls put in too many beans, they could pull some out, half a dozen or so.

Q. That is, with the mold?

A. No, with this here.

Q. With a mold it sometimes went under the required number of beans?

A. Yes. depending on the canner; if she did not put enough beans into the mold, naturally the can would be slack, and there wouldn't be enough beans in there to make a good pack, and when you open up a can the beans, instead of standing up in a bunch, will fall apart.

Q. At the time that you made this **experiment**, did you make any attempt to figure what the difference in cost might be?

A. No, we did not."

(Testimony of I. Rancadore, Manager of Defendant; Record, page 63, et seq.)

It will be observed that both counsel and witness for defendant referred to their activities as an **experiment**.

The fear of injunction passed for the moment and the appellee abandoned its experiment. In 1923 and 1924 appellee abandoned its license from appellant's assignor and used the device which has been held an infringement. In 1925, after the decision of the Circuit Court of Appeals, it was apparent that the appellee would have to abandon its infringing device. We will let the defendant speak through its manager:

"Mr. ARMSTRONG. Q. Mr. Rancadore, you did not take a license in 1923?

A. No.

Q. Nor in 1924?

A. No.

Q. During those two years, did you use any molds?

A. We used my mold.

Q. Your patent having previously been granted?

A. Yes.

Q. When you say 'my mold,' you mean the mold that was offered in evidence in this case which is now pending?

A. Yes.

Q. Then in 1925 what did you do?

A. As soon as we found out we could pack asparagus style string beans by any other method except the method of the mold similar to the Greco mold, we immediately went back to the hand pack, which we have continued ever since.

Q. You started that in the season of 1925?

A. Yes.

Q. While the suit was still pending?

A. Yes, it was pending, but the decision was already given, and at that time we took an appeal, and the appellate court decided that the claims——

The MASTER. We know all about that.

Mr. ARMSTRONG. Q. That suit was pending?

A. Yes.

Q. You went back to your form of mold that you **experimented** with in 1922?

A. Yes, this is the one we have been using.

Q. Will you explain the difference between the two molds?

A. We saw that when you cut the beans this way, the beans do not rest on anything here, they are kind of *limber*, *you do not make a clean cut on the bottom*, *so we extended the wood part here so that all of the beans rested on it*, *and when you cut you would make a clean cut.*

Q. The beans, before they had been put in the mold, had been blanched?

A. Yes.

Q. That was the mold that you had in 1923?

A. 1925, 1926, and 1927.

Q. It was upon the use of that mold in those years that you based the statement which you

have filed with this Court, and which you swore to on the 14th of October, 1926, as to comparative cost?

A. Yes.

Mr. ARMSTRONG. I wish to introduce in evidence the shorter one of these two models as Defendant's Exhibit 1, and the longer one as Defendant's Exhibit 2.

The MASTER. They will be so received and marked.

(The models were marked Defendant's Exhibits 1 and 2.)

Mr. ARMSTRONG. That is all."

(Testimony of I. Rancadore, Record, page 70, et seq.)

The model known as Model No. 1 is still referred to as an **experiment**. It had not yet been developed and continued experimentation disclosed its defects, and these had to be remedied before it could be used commercially.

Again, we let appellee's manager tell the story of his experiment:

"Q. In 1922, you operated under a license from Anthony Greco?

A. Of \$500, yes.

Q. And you used a mold which you, yourself, or someone in your employ, prepared, and which was subsequently offered for patent?

A. Yes.

Mr. ARMSTRONG. Q. And patent issued?

A. And patent issued.

Mr. LINN. Q. And that was the mold which was the infringing device referred to in this case?

A. Yes.

Q. When, in the year 1922, did you use this device?

A. In July, 1922.

Q. Defendant's Exhibit No. 1 in evidence.

A. In July, 1922.

Q. In July, 1922?

A. Yes.

Q. You discarded it after packing about six cans?

A. Yes.

Q. At that time did you in any way make any comparison of the cost of packing string beans with this mold Defendant's Exhibit No. 1, with the Greco device?

A. I did not, because it was not necessary.

Q. You did not?

A. No.

Q. In 1922, or 1923, did you use either of the devices No. 1 or No. 2 in evidence?

A. No, I did not.

Q. In 1924 did you use either of the devices in evidence?

A. Yes, I did.

Q. Which one?

A. No. 2.

Q. You used No. 2?

A. Yes.

Q. That is in the year 1924?

A. 1925.

The MASTER. How about 1924?

A. In 1924 I was working under my own mold; at the time the suit was still pending, I did not want to use this, on account of the threat of being sued, anyway, whether I packed them by hand, or not, so I thought I had better stay with my own mold, because of having a patent on it.

The MASTER. Q. You began to use No. 2 there in 1925?

A. In 1925.

Mr. LINN. Q. *You did not experiment any further with mold No. 1?*

A. No.

Q. *After 1922?*

A. No.

Q. You again took up the matter of experimenting with the mold or device other than the Greco patent in the year 1925?

A. In 1925 we used the hand method."

(Testimony of I. Rancadore, Record, page 78, et seq.)

Let the witness Eugene J. Filice, an employee of appellant's assignor, tell of the experiment which he carried on at the request of defendant and to the betrayal of his employer:

"Q. Then when did you first start working on mold No. 1?

A. On this mold No. 1, in July of 1922.

Q. July, 1922?

A. With this No. 1.

Q. Where were you then working?

A. I was working for Mr. Greco at that time. This **experimenting** took place one evening, late one evening.

Q. While you were still working for Mr. Greco?

A. Yes.

Q. You went over to the San Jose Canning Company?

A. Yes.

Q. And worked on this No. 1 mold?

A. Yes.

Q. It was evident at that time that asparagus-pack string beans were a success?

Mr. ARMSTRONG. I object to that as calling for a conclusion of the witness.

Mr. LINN. Let me finish the question.

Q. You were working with Mr. Greco on that pack and you went over in the evening to see Mr. Rancadore, and tried to work out something else?

The MASTER. That is simply a comment on the evidence already in.

Mr. LINN. I will withdraw the question.

Q. In 1922 you worked at night on this model No. 1?

A. Yes.

Q. And canned about six cans of string beans?

A. Yes, about six cans.

Q. At night?

A. Yes.

Q. Did you work nights in that plant?

A. I was not working there, I was called there on account of some difficulty they were having in the No. 10 gallon cans; they were having trouble with the bulging out of them after they were cooked; the gallon cans were not coming out perfect.

The MASTER. Q. Now, just tell me what happened.

A. I was called over there by this Mr. Cusimano, who was assistant superintendent at the time, and who was taking care of this cooking, and on account of this difficulty he came and got advice from me while I was in the employ of Mr. Victor Greco, so I promised him I would be over that evening and help him out on it, and while I was there that evening looking over his difficulty in the No. 10 cans, this thing had been brought out, after I was there a while, and we tried the packing of string beans with this No. 1 mold.

Q. What was done?

A. Well, Mr. Rancadore, and Mr. Cusimano, and myself, we got some string beans, we blanched them, we put beans in this No. 1 form, here, we cut off one end, and later the other, and then we got the beans by hand and placed the back part of this bunch into the can, first, and then applied the thumbs, in squeezing, got the front part started, and when that was done, with the aid of bouncing, we began pushing into the can, and we saw they would slide down into the can very conveniently.

Q. What did the beans look like after that?

A. They looked exactly like they would with the mold that we used, in fact they were better; you could get more in there; due to the mold

being smaller in diameter than the can, you naturally could not get as many in with that as you could squeezing them by hand."

(Testimony of Eugene J. Filice, Record, pages 93 et seq.)

The witness Matteo Cusimano was the third person who took part in the development of Exhibits 1 and 2. The following excerpt from his testimony discloses the nature and character of the experiment:

"A. Mr. Rancadore said that he would like to have something of this kind to see how it would work, and I worked it out the best I could. I bent up a couple of pieces of iron.

Mr. ARMSTRONG. Q. Did you see them trying to pack beans, using that mold?

A. Yes.

Q. When was that done?

A. That was that same evening that I had made that.

Q. Did they pack any beans from that mold into cans?

A. They packed a few cans, yes.

Q. How did it work? Were they able to pack?

A. It was satisfactory, as far as I understand from Mr. Rancadore.

Q. They had to lift the beans out of the mold and put them into the can?

A. Yes.

Q. Did they make a good, solid pack?

A. They filled in pretty good.

Q. How about the cutting of the beans? The beans have to be cut, don't they?

A. Yes.

Q. How about the cutting of the ends on that No. 1 mold, that one, there, that you made?

A. The only difficulty is when the knife is dull. If the knife is good and sharp it cuts every one. In fact, we had no trouble at that time.

Q. Were you employed continuously from 1922 on by the San Jose Canning Company?

A. Practically, yes.

Q. Are you employed by them now?

A. Yes.

Q. In 1922, were you familiar with the method of packing beans in bunch form, asparagus style?

A. No, that is, not in asparagus style.

Q. You are not familiar with the canning?

A. No.

Q. Do you know how the San Jose Canning Company packed them in those years?

A. The way they packed, when I had work in there and saw, there was no mold used in those years.

Q. But when they packed them in 1922, do you know how they packed?

A. When I went in in 1922, when they started in in July, I found this mold, and it was already prepared to be used for the asparagus style of beans, so we did start out and we worked a few days, a week or so, I wouldn't say any more, and that was the time, I made this, and we tried it out.

Q. You got it out and you packed the beans with it?

A. Yes, tried it out.

Q. Have you ever seen that Mold No. 2 there?

A. Yes.

Q. Defendant's Exhibit No. 2?

A. Yes.

Q. When did you first see that?

A. The No. 2, I don't remember exactly, but I think it was in 1924; if I don't mistake it was in 1924. I seen Mr. Filice trying it out.

Q. In that year they used quite a few of these, did they?

A. Just **experimented** in 1924.

Q. How about 1925?

A. In 1925 they began using them."

(Testimony of Matteo Cusimano, Record, page 110, et seq.)

The experiment (ignoble in purpose) thus portrayed by the witnesses, is not available for use as a "standard of comparison" herein. It had not been completed prior to 1925 and after the infringement. It was not "known," "open to the public," "in common use," "open to the defendant," or "open to the world," prior to 1925.

Funk & Wagnalls, in their New Standard Dictionary (1914), define the word "known" as follows:

"known: apprehended mentally; recognized; understood; especially, recognized by all as the truth; as, his honesty is *known*; *known* and unknown quantities."

and gives as a synonym therefor the words "eminent" and "notorious."

The same dictionary gives "notorious" as a synonym for the word "open."

The word "available" is therein defined as follows:

"available: 1. capable of being employed or made use of to advantage; suitable for the accomplishment of a purpose; usable; at one's disposal; profitable; as, an available excuse; available assets. 2. Sufficient in power or efficacy for producing the desired results; effectual; valid; as, an available argument."

"Common" is thus defined:

"common: 2. Pertaining to, belonging to, or participated in by two or more persons, things, or parts alike; participating in or appertaining to all or the whole; joint; general; public; as, death is common to the human race; my brother and I are common owners of the estate."

and among the synonyms therefor are "common-place," "customary," "everyday," "public," etc.

Judge Bourquin states the rule in the case of

Minerals Separation v. Butte Superior Mining Co., 274 Fed. 878,

as follows:

“The rule of comparison is settled law, and contemplates that the infringer had a choice of processes, chose that of the patent, and gained an advantage over what would have been his had he chosen otherwise. Obviously his choice is made from processes existing at the time of infringement, from day to day, and as alternative presents itself.”

In the western district of New York the same rule was announced and applied to the facts in the case of

Philadelphia R. Wks. v. U. S. Rubber Reclaim Wks., 276 Fed. 600, at page 605:

“The non-infringing alkali process later adopted by defendants, and known to them since 1906, is *not shown to have been advantageously used at any time before the infringement*. In its adaptation in 1915 it may fairly be assumed that information was acquired by defendants enabling them to develop or modify the Marks process, and any modified process was not, in my opinion, a proper standard of comparison.”

The last cited case went on appeal to the Circuit Court of Appeals, Second Circuit, and was affirmed in the case of

Philadelphia R. Wks. v. U. S. Rubber Reclaim Wks., 277 Fed. 171, 176:

“(4) The standard of comparison, to be applicable, **must have been known** and open prior to the date of the plaintiff's patent. *Illinois Central Co. v. Turrill*, 110 U. S. 301, 4 Sup. Ct. 5, 28 L. Ed. 154; *Sessions v. Romadka*, 145 U. S. 29, 12 Sup. Ct. 799, 36 L. Ed. 609. Some courts have

held the date of appropriation of the invention by the defendant should be taken. *Brown v. Lanyon*, 179 Fed. 309, 102 C. C. A. 497; *Columbia Wiring Co. v. Kokomo*, 194 Fed. 108, 114 C. C. A. 186; *Amer. Pneumatic Co. v. Snyder* (D. C.) 241 Fed. 274. The field of selection of process which might be used should be, in principle, *that which is open to the art* at the time the invention is appropriated. Where there is a patent which forbids such use, the question is presented whether it is actually available to the infringer during the period of the infringement. Where the owner of the patent declines to permit its use or grant a license, it cannot be set up as a standard of comparison.

“(5) *Processes which were developed after the infringement as a substitute for use by the defendants cannot be used as a standard of comparison. This record discloses no process that might be used as a standard of comparison. The rule is therefore applicable which requires the defendants to pay over to the plaintiff all the profits which they derived through unlawful infringement. Westinghouse v. Wagner*, 225 U. S. 604, 32 Sup. Ct. 691, 56 L. Ed. 1222.”

In this circuit Judge Gilbert announced practically the same rule in the case of

Fullerton W. G. Assn. v. Anderson-Barngrover Mfg. Co., 166 Fed. 443, at page 453:

“The advantage which the defendant derived from using the complainant’s invention, over what he could derive from using any other process or thing which was *known* prior to that invention, constitutes the profits which the complainant is entitled to recover.”

The use of processes in the experimental stage at the time of the infringement was condemned in the case of

Expanded Metal Co. v. General Fireproofing Co., 247 Fed. 899, at page 909:

“(7) If my decision were to rest on the differences between the two products, or the question of whether or not the corrugated process was adequate to produce the same product as is produced by complainant’s process, it would be difficult to sustain the master’s conclusion. Other considerations, however, are present, which bring me to the same conclusion as the master. *I am of opinion that a process yet in the experimental stage, and developed for the purpose only of avoiding infringement, made at or after the appropriation by the infringer of the other’s process, and covered by a patent to itself—that is, used experimentally and occasionally only during the infringing period, or only under compulsion of an injunction, and abandoned as soon as the infringer is at liberty to change back—does not make a case of another existing process, or means, open to the public and to the defendant, or constitute a basis of comparison in determining the gains and advantages from the use of the infringing process over other processes.*

“In Walker on Patents (5th Ed.) S. 725, it is said that the other article or process to be used as a basis of comparison must have been known or in existence prior to the date of the patent which is infringed; in other words, that the standard of comparison must have been known in the art prior to the complainant’s invention. In *Turrill v. Illinois Central R. R. Co.* (G. C.) 20 Fed. 912, it is explicitly stated that the process or article to be used as a basis for comparison must have been *open to the public* at the date of the patent which is infringed. Many excellent reasons are advanced in the opinion in support of this conclusion. The judgment in the case was affirmed by the United States Supreme Court in *Illinois Central R. R. Co. v. Turrill*, 110 U. S. 502, 4 Sup. Ct. 5, 28 L. Ed. 154. In *Sessions v.*

Romadka, 145 U. S. 29, 45, 12 Sup. Ct. 799, 803 (36 L. Ed. 609), Mr. Justice Brown says:

‘This court has, however, repeatedly held that in estimating damages in the absence of a royalty it is proper to consider the savings of the defendant in the use of the patented device over what was *known and in general use* for the same purpose anterior to the date of the patent.’

“An examination of *McCreary v. Pennsylvania Canal Co.*, 141 U. S. 459, 464, 465, 12 Sup. Ct. 40, 35 L. Ed. 817, convinces me that it is not in conflict with this statement of the law.

“Defendant contends that any article or process available to an infringing defendant at any time may be used as a basis of comparison. Strong reasons are advanced why the date of complainant’s patent should not be taken in determining the process open or available to the public or defendant. Whether these reasons should prevail over the reasoning of the learned judge in *Turrill v. Illinois Central R. R. Co.*, *supra*, I deem it unnecessary to express an opinion. I am of opinion, however, from an examination of all the cases cited, that *the other available process must have been in existence and open to public use in its completed form at the time the infringer appropriates a patented process; he should not be permitted to avail himself of inventions developed by himself or others after he has appropriated another’s property for the purpose of mitigating or avoiding the damage thus inflicted on another.*”

The Supreme Court of the United States has passed upon questions similar to the one here involved. In the case of

Mowry v. Whitney, 14 Wall. 620, 81 U. S. 620; 20 L. Ed. 860,

the rule as to a “standard of comparison” is laid down as follows:

“The question to be determined in this case is: what advantage did the defendant derive from using the complainant’s invention over what he had in using *other processes then open to the public and adequate to enable him to obtain an equally beneficial result?* The fruits of that advantage are his profits. They are all the benefits he derived from the existence of the Whitney invention.”

The same rule was approved in the case of

Goulds Mfg. Co. v. Cowing, 105 U. S. 253; 26 L. Ed. 987.

In the case of

Black v. Thorne, 111 U. S. 122; 28 L. Ed. 372,
the court held the true rule to be:

“The question, therefore, was, what advantage in its production did the use of the improvements in burning wet tan have over other *known* methods in *common use* of producing the same result, that is, the same heat?”

In the instant case it was clearly demonstrated that at the time of the infringement there was no “*known*” method of canning string beans asparagus style “*in common use.*” Therefore, no “standard of comparison” is available to defendant.

The doctrine set forth in the case of *Mowry v. Whitney*, *supra*, is cited with approval in the cases of
Tilgham v. Proctor, 125 U. S. 136; 31 L. Ed. 664;

Sessions v. Romadaka, 145 U. S. 29; 36 L. Ed. 609.

CONCLUSION.

It is respectfully submitted that a "standard of comparison" should be known at or prior to the time of infringement in order to be available to an infringer. Not only must it be "known" but it must be "known to the public." The "standard of comparison" must have passed the experimental stage and be available commercially.

An examination of the authorities leads to the conclusion that the rule of a "standard of comparison" does not contemplate a secret or unknown thing. Something to be conjured up at a midnight meeting under the stress and threat of an injunction proceeding as happened in this case.

If the rule permitted otherwise, all an infringer would have to do would be to work out the new process when caught infringing and then say that he knew of the new process all the time, and none could gainsay him. When the courts use the word "known" as applied to a "standard of comparison," they mean nothing less than recognized, understood and even notorious. In addition to the word "known" the Courts use the words "open to the public," "available," "in common use," etc., all contradicting the idea of a secret process or something only known to an individual or available in the sense that everything in being or in contemplation is available if one but discovers it.

The record clearly discloses that prior to the patent of appellant, string beans were not canned "asparagus style;" that thereafter they were not so canned except by appellant's predecessors in interest and assignors,

until the appellee infringed the patent. Therefore no standard of comparison is available to appellee and appellant is entitled to all of defendant's profits derived from the sale of string beans "asparagus style" during the years 1923 and 1924.

We respectfully submit that the judgment of the District Court should be reversed with directions to again refer the matter of the accounting to the special master for the purpose of ascertaining all of appellee's profits derived from the sale of string beans "asparagus style" during the period in question and to render judgment in favor of appellant therefor.

Dated, San Francisco,

May 22, 1929.

Respectfully submitted,

CLARENCE A. LINN,

Attorney for Appellant.

No. 5714

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LOUIS ONEAL,

Appellant,

VS.

SAN JOSE CANNING COMPANY
(a corporation),

Appellee.

BRIEF FOR APPELLEE.

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Appellee.

BRIEF FOR APPELLEE.

For the purpose of explaining appellee's position in the beginning of the packing season of 1922 we offer a brief supplemental statement of fact.

Because appellant's assignors claimed exclusive right, under their patent, to pack beans asparagus style and threatened to enjoin appellee from thus packing beans, appellee applied for and was granted a license to use the so-called Greco device during the year 1922.

Testimony of I. Rancadore, manager of appellee, commencing on page 65 of the record.

"Q. Now, you spoke of a license from the Grecos. From that I understand you mean the owners of the patent that had been issued prior

to that time to Mr. Anthony Greco. That was the Greco you mean?

A. Yes, the Greco patent.

Mr. ARMSTRONG. It will be stipulated, I think, that that is the patent in controversy?

Mr. LINN. Yes.

Mr. ARMSTRONG. Q. At that time did you go out and solicit the use of the patent?

A. Why, yes, I did. I was told, in fact, that both Anthony Greco and Victor Greco claimed that he was the owner of the patent.

Q. Did they come to you or you go to them?

A. I think I went to them. I went to them, and Anthony Greco claimed that he was the owner of the patent, and, in fact, at that time the patent was in dispute, I believe, they had a lawsuit to prove the ownership of the patent at that time, and I personally was convinced through the advice of the attorney of Anthony Greco that Anthony Greco was the owner of the patent, and, if anything, I should do business with Anthony Greco, and not with Victor Greco.

Q. Well, was there any particular reason why you at that time experimented with hand packing?

A. That was in 1922. I had a license for that year.

Q. I am talking about 1922, when you had the license, was there any conversation about your lack of right, with the Grecos—your Honor understands that they were the assignors of the patent.

The MASTER. I understand.

Mr. ARMSTRONG. Q. (continuing.) Was there some conversation with either of them or both of them as to your lack of right to pack beans in bunch form, or asparagus form?

A. Yes.

Q. Can you give the conversation?

A. Mr. Victor Greco threatened that he would stop us whether we packed beans or not, inasmuch as he had a patent on that particular pack, and

nobody could pack string beans, no matter how they put them in the can, that he had a patent that covered that method.

Q. Was that one of the things that moved you to take this license?

A. Naturally, If I knew at that time I had the right to pack them by hand I would never negotiate with anybody when I could do it without taking any license.

Q. These threats came at the beginning of the pack?

A. At the beginning of the pack.

Q. Just when the pack is about to start?

A. Even though I had a license from Victor Greco, Anthony started a restraining order against us that year.

Q. You had some litigation; a suit was filed?

A. Yes.

Q. In the federal court?

A. Yes."

Appellee never made use of the device upon which a license was issued to it but used instead the device patented by witness Rancadore, which device was held to be an infringement on appellant's patented device.

(Testimony of I. Rancadore, continued on page 77 of the Record.)

"Mr. LINN. Q. Then you had a license under the Anthony Greco patent prior to the harvesting of the string beans in 1922?

A. Yes.

Q. You did not start the experiment using Defendant's Exhibit No. 1, until after you had the assignment of the Anthony Greco patent?

A. What do you mean by 'assignment'?

Q. The license.

A. It was during that pack, as soon as we started the pack.

Q. As soon as you started packing you started experimenting with this device or mold which is in evidence as Defendant's Exhibit No. 1?

A. Yes.

Q. At that time you were operating under the Greco license, were you not?

A. I was, but I did not expect to use this. I wanted to satisfy myself whether it could be done by hand, or not.

Mr. ARMSTRONG. Q. Did you satisfy yourself?

A. Yes absolutely.

Mr. LINN. Q. Did you ever use that mold, Defendant's Exhibit No. 1. at all, in the year 1922?

A. Just about half a dozen cans.

Q. For about six cans?

A. Yes.

Q. You discarded it then?

A. Yes, I did not intend to use it because I had a license to pack.

Q. At the same time you were experimenting on another mold?

A. I was experimenting to see if it could be done by hand.

Q. At the same time you were experimenting on another mold which experiments culminated in an application for a patent for a mold in this case. Is that true?

A. Yes. I did not pack with the mold of Anthony Greco, at all; I used my own mold during that year.

Q. During that year?

A. In 1922, I did not use his mold, at all although I had a license; I used my own mold, because I thought it worked easier than the other one.

Q. In 1922, you operated under a license from Anthony Greco?

A. Of \$500, yes.

Q. And you used a mold which you, yourself, or someone in your employ, prepared, and which was subsequently offered for patent?

A. Yes.

Mr. ARMSTRONG. Q. And patent issued?

A. And patent issued.

Mr. LINN. Q. And that was the mold which was the infringing device referred to in this case?

A. Yes.

Q. When, in the year 1922, did you use this device?

A. In July, 1922.

Q. Defendant's Exhibit No. 1 in evidence.

A. In July, 1922.

Q. In July, 1922?

A. Yes.

Q. At that time did you in any way make any comparison of the cost of packing string beans with this mold Defendant's Exhibit No. 1, with the Greco device?

A. I did not because it was not necessary.

Q. You did not?

A. No.

Q. In 1922, or in 1923, did you use either of the devices No. 1 or No. 2 in evidence?

A. No, I did not.

Q. In 1924 did you use either of the devices in evidence?

A. Yes, I did.

Q. Which one?

A. No. 2.

Q. You used No. 2?

A. Yes.

Q. That is in the year 1924?

A. 1925.

The MASTER. How about 1924?

A. In 1924 I was working under my own mold; at the time the suit was pending, I did not want to use this, on account of the threat of being sued, anyway, whether I packed them by hand, or not, so I thought I had better stay with my own mold, because of having a patent on it.

The MASTER. You began to use No. 2 there in 1925?

A. In 1925.

Mr. LINN. Q. You did not experiment any further with mold No. 1?

A. No.

Q. After 1922?

A. No.

Q. You again took up the matter of experimenting with the mold or device other than the Greco patent in the year 1925?

A. In 1925 we used the hand method.

Q. In the year 1925 you developed the mold in evidence as Exhibit No. 2?

A. I would not call that a mold, I would call that more a form to hold string beans.

Mr. ARMSTRONG. He did not develop it.

A. It is not developed, it is the same thing, only I changed the size of the plates."

Appellee was not a deliberate infringer. It worked, during the two seasons under discussion in this hearing, in good faith, with a device invented by its manager Mr. Rancadore, upon which a United States patent had been issued.

ARGUMENT.

The sole question before the Court is the soundness of the learned Master's ruling that the hand method of packing beans asparagus style, assisted by the measuring device used by appellee during the packing seasons of 1925 and 1926 was a fair standard of comparison upon which to base a computation of the profits to which appellant was entitled by reason of appellee's infringement of appellant's patent. Appellant apparently contends that the method used must have been known, open and available to appellee prior to the date of the infringed patent or at least

must have been a widely known, public notorious method rather than "known and open to defendants."

Appellant opens his argument (Appellant's Brief, p. 5) by a quotation from *American Pneumatic Service Co. v. Snyder*, 241 Fed. 274, in which are briefly cited many various and conflicting statements as the bases of a standard of comparison. From this quotation it would appear that the opinion in which it was found cited them with approval. Such was not the case however. At page 277, after quoting with approval, a lengthy excerpt from *Columbia Wire Co. v. Kokomo Steel and Wire Co.*, 194 Fed. 108, the Court says:

"To my mind, upon principle, and seemingly unopposed by authority except the Turrill case, *supra*, (*Turrill v. I. C. R. Co.*, 20 Fed. 912), selection of a standard for comparison to ascertain profits is not restricted to unpatented devices, or to such devices or processes as were a part of the art at the date of the patent infringed. The field for selection embraces all that was a part of the art at the time the invention is appropriated, whether patented or not."

Appellee found in 1922 that the hand method of packing, with the assistance of the measuring device (Defendant's Exhibit No. 1) used at that time, was practicable and highly satisfactory. This finding was confirmed when it resorted to that method in the year 1925 and since. The only change made over the 1922 method was a lengthening of the block base of Exhibit No. 1 to facilitate cutting. This change produced Exhibit No. 2 which was thereafter used. As said by the Learned Master in his opinion and order on standard of comparison (Record, p. 137),

“The conclusion therefore follows that the hand packing method of defendant as described and as practiced in the seasons of 1925 and 1926 had been substantially developed by him as early as July, 1922; that he could have used hand packing aided by either Exhibit 1 or Exhibit 2 in the years 1923 and 1924 when he used the infringing mold, and that therefore this hand packing, as practiced, is a proper standard of comparison to be used in this accounting. The fact that there is a slight difference between Exhibit 1 and Exhibit 2 is immaterial. Exhibit 1 could have been used, but the modification by extending the block to facilitate cutting was obvious and a development that ensued naturally as soon as the method was put into practice.”

Appellant makes much of the references to the trial of the hand method in 1922 as an “Experiment.” It apparently was a most successful and convincing experiment for witness Rancadore, (Record p. 85) and the witness Filicie (Record p. 95), agree that the resulting pack was as good or better than with the Greco mold.

While we believe that the statement of Judge Bourquin in *Minerals Separation Co. v. Butte Mining Co.*, 274 Fed. 878, quoted at the top of page 16 of appellant’s brief, states the law as to the rule of comparison we think it would be still clearer if the remainder of his opinion on that point were quoted. Continuing on page 879, the learned Judge says:

“He is not limited in fact to the process of the patent and processes existing only at the date of the patent, and the principle of standards does not require nor sanction that he be so limited in theory. For the advantage he actually gains, and which as profits or savings he must render to the

patentee, is only that of the invention over other processes he might have chosen in lieu of the invention and did not.”

“* * * The event to which the Court refers is the infringement, and the time to which it refers is ‘then’—at that time, the time of the antecedent event. The Circuit Court of Appeals of the Seventh Circuit has likewise determined in *Columbia etc. Co. v. Kokomo Steel and Wire Co.*, 194 Fed. 108, 114 C. C. A. 186, and Judge Rellstab of the Third Circuit likewise in *American etc. Co. v. Snyder (D. C.)* 241 Fed. 274. To their collation of cases, and to their comment, little can be added.”

This Court considered a very similar state of facts in the case of *Dunkley Co. v. Central California Canneries*, 7 Fed. (2nd) 972. At page 975 the Court says:

“It was competent for the parties to offer proof as to the means available to the defendants at the time when the infringement took place, and it was the duty of the master to determine the profit or advantage to the defendants in the case of plaintiff’s invention as compared with other means available.”

The method of hand packing was certainly well known for it was used for years in the packing of asparagus. Had appellant’s method or process claims in his patent been sustained the situation would be different. But they were not, and certainly the obvious hand packing method assisted by a non infringing measuring device, developed long prior to the infringement and so simple that no inventive genius was necessary, was open and available to appellee or any one else who desired to pack beans or any other vegetable “asparagus style” without using the patented mold.

As to the measuring device (Defendant's Exhibit No. 1) witness, Matteo Cusimano, testified as follows: (Record p. 110)

“Q. Mr. Cusimano, in the year 1922, what was your occupation?

A. I was a mechanic and assistant superintendent in the San Jose Canning Company.

Q. When did you first see that block, there, indicating Defendant's Exhibit No. 1.

A. You mean when I saw that?

Q. When did you first see it.

A. I made that.

Q. When did you make that?

A. The latter part of July, I couldn't tell exactly.

Q. What year?

A. In 1922.

Q. For what purpose was that made?

A. The form like that was made to get the quantity of the beans, I understand.

Q. You made that to get the quantity of the beans?

A. The quantity of the beans.

Q. How were the beans to be packed, in what way?

A. Asparagus style.

The MASTER. Q. Who told you to make that?

A. Mr. Rancadore said that he would like to have something of this kind to see how it would work, and I worked it out the best I could. I bent up a couple of pieces of iron.

Mr. ARMSTRONG. Q. Did you see them trying to pack beans, using that mold?

A. Yes.

Q. When was that done?

A. That was the same evening that I had made that.

Q. Did they pack any beans from that mold into cans?

A. They packed a few cans, yes.

Q. How did it work? Were they able to pack?

A. It was satisfactory, as far as I understand from Mr. Rancadore.

Q. They had to lift the beans out of the mold and put them into the can?

A. Yes.

Q. Did they make a good, solid pack?

A. They filled in pretty good.

Q. How about the cutting of the beans. The beans have to be cut, don't they?

A. Yes.

Q. How about the cutting of the ends on that No. 1 mold, that one, there, that you made?

A. The only difficulty is when the knife is dull. If the knife is good and sharp it cuts every one. In fact we had no trouble at that time."

The same witness on cross-examination (Record p. 115):

"Mr. LINN. Q. How long did it take you to prepare this mold?

A. It didn't take me long, I should judge about 30 minutes.

Q. About 30 minutes?

A. Yes."

The Master has found from the evidence adduced, that the method of packing used by appellee in 1925 and 1926 had been substantially developed as early as July, 1922, and that that method could have been used in the years of 1923 and 1924 in which latter years the infringing device was used.

Appellant offered no evidence to the contrary, nor did he show or attempt to show that the use of the infringing machine brought the defendant an advantage or profit other than that found by the Master.

"The burden devolved on plaintiff to show that the use of the infringing machine brought the defendants an advantage and profit."

Dunkley v. Central Cal. Canneries Co., supra, p. 975.

At page 974 the Court says:

“In determining the profits with which a defendant in a patent suit is chargeable, the burden of proof rests upon the plaintiff.”

At page 974 the Court says:

“The findings of the Master in passing on disputed questions of fact are entitled to great respect. Where as in this case, they are approved by the District Court, there is strong presumption that they are correct.” (Citing numerous supporting cases.)

There was nothing secret or unknown about the hand packing method and the measuring device was so simple and obvious that the suggestion of its need caused witness Cusimano “to bend up couple of pieces of iron” (Record p. 110) and on page 115 of the Record “It didn’t take me long, I should judge about 30 minutes.”

The appellee did not, as suggested in appellant’s brief, “work out the new process when caught infringing.” And the fact that the “new” process was known to appellant long before the infringement was testified to by the witnesses Rancadore, Filice and Cusimano, and their testimony stands uncontradicted and was believed by the Master.

CONCLUSION.

It is respectfully submitted that the Master correctly determined that the hand packing process used by appellee gave a proper standard of comparison for the computation of profits. No other proof on

the part of the appellant was offered or submitted by him though the burden of proof on this point rested on him.

It is further respectfully submitted that the judgment of the District Court should be affirmed.

Dated, San Francisco,
June 19, 1929.

Respectfully submitted,

R. M. J. ARMSTRONG,

A. SCHAPP,

Attorneys for Appellee.

United States
16
Circuit Court of Appeals
For the Ninth Circuit.

A. B. HUMPHREY COMPANY, a Corporation,
Appellant,

vs.

BEN H. ARKELIAN and BEN H. ARKELIAN
& CO., a Copartnership,
Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for
the Northern District of California,
Southern Division.

FILED
FEB 28 1920
PAUL P. CLEWIS,
CLERK

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In the District Court of the United States, for the
Northern District of California, Southern Di-
vision.

IN EQUITY—No. 1951.

A. B. HUMPHREY COMPANY,

Plaintiff,

vs.

BEN H. ARKELIAN and BEN H. ARKELIAN
& CO.,

Defendants.

BILL OF COMPLAINT FOR INFRINGEMENT
OF REGISTERED TRADE-MARK.

Now comes A. B. Humphrey Company, a corpo-
ration, and complaining of defendants above
named, for cause of action alleges:

I.

That the plaintiff during all the times hereinafter
mentioned was and is a corporation duly organized

and existing under and by virtue of the laws of the State of California, having its principal place of business in the City of Escalon, County of San Joaquin, and State of California.

II.

That the defendant Ben H. Arkelian, during all the times hereinafter mentioned was and is a resident of the City of Modesto, County of Stanislaus, and State of California. That the defendant Ben H. Arkelian & Co. is a copartnership consisting of Ben H. Arkelian and A. W. Phelps, and having a place of business in the City of Modesto, County of Stanislaus, State of California. [1*]

III.

That the ground upon which the Court's jurisdiction depends is that this is a suit in equity arising under the trade-mark laws of the United States.

IV.

That plaintiff is now the owner of a trade-mark, to wit, "Lady Fingers," for use on grapes, having succeeded to all rights of one A. B. Humphrey, who, on or about September 10, 1895, entered into the business of growing and packing and shipping grapes, under the original and distinctive name of "Lady Fingers," and ever since that time plaintiff and its said predecessor have continuously used said trade-mark in interstate commerce, by affixing the same to boxes or packages containing grapes; that said trade-mark had not been in use by others prior to its adoption and use by plaintiff's prede-

*Page-number appearing at the foot of page of original certified Transcript of Record.

cessors; that through a long course of honorable dealing, and by virtue of the excellent quality of plaintiff's product, said trade-mark "Lady Fingers" has long since come to indicate grapes produced and sold by plaintiff, and a valuable reputation and good-will has been built up under said trade-mark throughout the several states of the United States, which plaintiff would now enjoy exclusively, except for the infringing acts herein complained of.

V.

That so being the owner of said trade-mark, on the 2d day of April, 1924, the said A. B. Humphrey filed in the Patent Office of the United States on said date an application for registration for such trade-mark; said application being in writing, addressed to the Commissioner of Patents, signed by the applicant, specifying his name, domicile, location, and citizenship; the class of merchandise, and the particular description of goods [2] comprised in such class to which said trade-mark was appropriated; a description of the trade-mark itself, and a statement of the mode in which the same was applied and affixed to goods, and the length of time during which the trade-mark had been used. With this statement was filed a drawing of the trade-mark, signed by the applicant, or his attorney, and such number of specimens of the trade-mark, as actually used, as were required by the Commissioner of Patents. And said A. B. Humphrey paid into the Treasury of the United States the sum of ten dollars, and otherwise complied with

the requirements of the Act of Congress entitled "An Act to authorize the registration of trade-marks used in commerce with foreign nations or among the several states, or with Indian tribes, and to protect the same," which Act was approved February 20, 1905. Said application was accompanied by a written declaration verified by the said applicant, to the effect that the applicant believed himself to be the owner of the trade-mark sought to be registered, and that no other person, firm, corporation, or association, to the best of the applicant's knowledge and belief, had the right to such use either in the identical form or in such near resemblance thereto as might be calculated to deceive; that said trade-mark was used in commerce among the several states, and that the description and drawing presented truly represented the trade-mark sought to be registered; which said declaration was strictly in accordance with Section 2 of said Act, and duly verified before a proper officer as provided in said Section.

VI.

That thereupon due proceedings were had according to law, and it appearing upon the examination of said application in said Patent Office that said applicant was entitled to have his [3] trade-mark registered under the provisions of the above-mentioned Act, due publication thereof took place, and no notice of opposition being filed thereto, registration of said trade-mark was duly granted according to law, and a certificate of registration was thereafter, to wit, on the 22d day of July, 1924,

issued to the said A. B. Humphrey, which certificate was numbered 186,739, pursuant to Section 11 of the aforementioned Act; which said certificate of registration is still in force, a copy of which is hereunto attached and made a part hereof.

VII.

That plaintiff is, by virtue of an assignment duly executed by the said A. B. Humphrey to said plaintiff on the 6th day of September, 1927, owner of the entire right, title and interest in and to the said trade-mark and the registration thereof, No. 186,739, together with all rights of action and claims for damages and profits thereunto accrued or thereafter accruing, and the good-will of the business in connection with which the said trade-mark was and is used; all as will more fully appear from the original assignment, hereunto attached and made a part hereof.

VIII.

That said trademark and the right to the exclusive use thereof is of great value to plaintiff, and any infringement thereof, or any use of a mark so closely resembling the same as to mislead the public into believing that they are procuring plaintiff's goods when they are not plaintiff's goods will cause irreparable injury to plaintiff, and will deprive plaintiff of the just reward and fruits of its well-earned reputation for fresh or table grapes, by reason of the fact that plaintiff's said grapes have become well and very extensively known by the [4] short designation of "Lady Fingers"; and that by reason of this fact pur-

chasers and the public generally in the purchase of such grapes have come to identify the same as plaintiff's products largely, if not entirely, by reason of the presence upon the label of the words "Lady Fingers," paying little, if any, attention to the color or other characteristics of the various labels, which color and characteristics are subject to change, and present quite a variety of appearances.

IX.

That defendants are sellers of and dealers in grapes; that subsequent to the 22d day of July, 1924, and within the Northern District of California, and in the City of Portland, Oregon, and elsewhere, contriving to injure plaintiff and plaintiff's predecessor in interest in its and/or his business, and to divert to themselves the benefit and advantage which otherwise would have accrued to plaintiff or its said predecessor, from the excellence and popularity of its and/or his said grapes known to the trade as "Lady Fingers," defendants jointly began putting on the market grapes in cartons, boxes, and containers, on which were pasted labels on which the words "Lady Fingers" appeared in prominent type, and sold the same and offered the same for sale as "Lady Fingers," by reason of which said grapes so labelled were calculated to deceive the public and did actually deceive the public in many instances into the belief that in buying defendant's grapes they were buying the grapes of plaintiff or its predecessor, whereby great confusion was created in the market as to the origin of said grapes, to the great damage and injury of plaintiff

and its predecessor, and in infringement of its and his vested rights of trade-mark. [5]

X.

That defendants so sold and offered said grapes for sale and so labelled them in infringement of the registered trade-mark of plaintiff and its predecessor, as above set forth, not only within the Northern District of California, but in commerce among the several states, and has thereby caused and is threatening to continue to cause great and irreparable injury to plaintiff's said business unless defendants can be restrained by order of this Honorable Court.

XI.

That said use of plaintiff's registered trade-mark on the part of said defendants, and the putting of their grapes on the market as and for plaintiff's goods, constitute not only an infringement of plaintiff's lawful trade-mark, but also unfair and unlawful competition on the part of defendants, which, if continued, will cause irreparable loss and injury to plaintiff.

XII.

That ever since the date of registration of said trade-mark, plaintiff and its predecessor have given due notice of such registration to the public by marking upon the label bearing the trade-mark "Lady Fingers" the words "Reg. U. S. Pat. Off."; and in addition the plaintiff has caused written notice of the infringing acts herein complained of to be served upon defendants, and requested that defendants discontinue the aforesaid infringing

acts, notwithstanding which defendants continued their infringing acts, and threaten to continue the same, to the great injury and damage of plaintiff.

WHEREFORE, as plaintiff can have no adequate relief except in a court of equity, it prays that a writ of subpoena issue, out of and under seal of this Honorable Court, directed to [6] the said defendants and each of them, commanding them to be and appear on a certain day and under penalty in this court then and there to answer this complaint, but not under oath, the oath thereto being expressly waived; that defendants may be compelled to account for and to pay to plaintiff the profits by them acquired and the damages suffered by plaintiff from the said unlawful acts; and that the amount of said damages be trebled in view of the wilful character of the infringement; and that defendants, their servants, agents, and attorneys may be enjoined and restrained by the order of this Court from the use of the words "Lady Fingers," and from selling or offering for sale their grapes as "Lady Fingers," and from doing any other acts or things which are intended or calculated to create confusion as to the origin of plaintiff's goods, and from attempting to divert to defendants any part of the trade which plaintiff has built, in connection with its predecessor, or by means of said trade-mark, and by means of plaintiff's well-earned reputation for superiority of grapes.

And plaintiff prays in this regard not only a preliminary injunction restraining defendants and each

of them, their servants, agents, and attorneys, as heretofore prayed, during the pendency of this suit, but also a perpetual injunction, and for such other and further relief as to this Honorable Court may seem fit.

A. B. HUMPHREY.

By (Signed) A. B. HUMPHREY,
President.

CHAS. E. TOWNSEND,

WM. A. LOFTUS,

Attorneys for Plaintiff. [7]

State of California,

City and County of San Francisco,—ss.

A. B. Humphrey, being duly sworn, deposes and says that he is president of A. B. Humphrey Company, a corporation, plaintiff, and is the A. B. Humphrey referred to as plaintiff's predecessor in the within entitled action; that he has read the foregoing bill of complaint for infringement of registered trademark, and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters, that he believes them to be true.

Signed: A. B. HUMPHREY.

Subscribed and sworn to before me this 19th day of September, 1927.

[Seal]

Signed: W. W. HEALEY,

Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed September 19, 1927. [8]

[Title of Court and Cause.]

INTERROGATORIES PROPOUNDED TO DEFENDANTS BY PLAINTIFF.

Now comes A. B. Humphrey Company, plaintiff in the above-entitled suit, under Equity Rule 58, and propounds to the defendant Ben H. Arkelian, above named, the following interrogatories to be answered under oath, for the discovery of facts material to the support of plaintiff's case:

I.

When and where did defendant Ben H. Arkelian first learn or hear of the words or name "Lady Fingers" applied to fresh grapes?

II.

State the names and addresses of any persons, firms, or corporations who used the name "Lady Fingers" on grapes prior to 1896, and the place where such uses occurred.

III.

State the names and addresses of any persons, firms, or corporations, other than plaintiff, who have actually employed the name "Lady Fingers" on grapes between the years 1895 and 1925. [9]

IV.

State exactly when and where and in what manner defendant Ben H. Arkelian acquired his first knowledge of the use of "Lady Fingers" as applied to grapes.

V.

State precisely the sources of the information and belief which enable defendants to allege in their answer that "for over 40 years immediately last past a variety of grapes known as and called "Ladyfinger" grapes and "Lady's Finger" grapes has been grown, produced, marketed, and sold in the State of California and in the several states of the United States and in foreign countries."

VI.

State precisely when and where defendant Ben H. Arkelian first acquired his knowledge of the application of the name "Lady Finger" to a variety of grapes produced in the State of California, and by whom said name was first applied to such variety of grapes.

VII.

Is there in existence any printed matter showing the use of the name "Ladyfinger" or "Lady's Finger" on grapes by others than plaintiff, prior to 1924; and if so, give further particulars thereof.

VIII.

Give the names and addresses of any persons, firms, or corporations who, in the San Joaquin Valley, employed the name "Ladyfinger" or "Lady Fingers" on grapes in 1883 or thereabouts.

CHAS. E. TOWNSEND,

WM. A. LOFTUS,

Attorneys for plaintiff.

October 28, 1927.

[Endorsed]: Filed Oct. 28, 1927. [10]

[Title of Court and Cause.]

ANSWER OF BEN H. ARKELIAN TO INTER-
ROGATORIES PROPOUNDED TO DE-
FENDANT BY PLAINTIFF.

United States of America,
State of California,
County of Fresno,—ss.

Comes now Ben H. Arkelian, one of the defend-
ants above named, and, being first duly sworn on
oath, deposes and makes answers to the interroga-
tories propounded to defendant by plaintiff as fol-
lows, to wit:

I.

Answering Interrogatory I, defendant Ben H. Arkelian, states that he first learned and heard the name “Lady Fingers” applied to fresh grapes in the County of Fresno, State of California, about the year 1895; that about the year 1895 he saw growing on the Eisen Vineyard about six miles east of Fresno “Lady Finger” grapes, which were then commonly known and called “Lady Finger” grapes.

II.

Answering Interrogatory II, defendant, Ben H. Arkelian, does not know the name and address of any person, firm or corporation, who used the name “Lady Fingers” on grapes prior to 1896, except that said defendant does know that the words “Lady Fingers” was used about that time to designate a variety of green grapes grown in the county of Fresno.

III.

Answering Interrogatory III, defendant, Ben H. Arkelian, states that the following persons, firms and corporations have actually employed the name "Lady Fingers" on grapes between the years 1895 to 1925:

Ben H. Arkelian, Modesto, California, [11]
Setchel Fruit Company, Fresno, California,
E. Y. Foley, Fresno, California,
California Growers & Shippers, Fresno, California,
Carl Melcher, McFarland, California,
Armstrong Nurseries, Ontario, California,
California Department of Agriculture, Sacramento,
California,

IV.

Answering Interrogatory IV, defendant, Ben H. Arkelian, states that as a child living in Fresno County, he saw "Lady Finger" grapes growing and ate "Lady Finger" grapes grown on the Eisen Vineyard along the Fancher Creek Canal at the eastern end of Eisen Vineyard, which was located about six miles east of Fresno, California; that these grapes at that time, which was about 1895, were commonly known as "Lady Finger" grapes.

V.

Answering Interrogatory V, defendant, Ben H. Arkelian, states that K. Arakelian, brother of defendant, Ben H. Arkelian, informed said defendant that for over forty years immediately last past a variety of grape known as and called "Lady Finger" and "Lady's Finger" has been grown, pro-

duced, marketed and sold in the several states of the United States and in foreign countries.

VI.

Answering Interrogatory VI, said defendant states that he first acquired his knowledge of the application of the name "Lady Finger" to a variety of grapes produced in the State of California in the county of Fresno at the Eisen Vineyard. Defendant does not know by whom said name was first applied to said variety of grapes.

VII.

Answering Interrogatory VII, defendant, Ben H. Arkelian, [12] states that there is the following printed matter in existence showing the use of the name "Lady Fingers" or "Lady's Finger" on grapes other than by plaintiff prior to 1924, to wit:

1. Webster's New International Dictionary and Encyclopedia of the English language, published in 1920 by G. & C. Merriman Company, Springfield, Mass. defines "Lady Fingers" and "Lady's Finger" as a variety of grape.
2. Armstrong's Nurseries at Ontario, California, published a catalogue in 1922 showing they had a variety of grapevines known as "Lady Fingers" for sale.
3. California Fruit and Vegetable Standardization Act of 1925, General Laws of the State of California, lists "Lady Fingers" as a variety of grapes.
4. California Fruit Traders Agents, Fresno, California, sold "Lady Fingers" grapes on October

3, 1923, which were loaded at Minkler, California, as shown by the inspection certificate of the Department of Agriculture of the State of California.

5. Official Publication No. 25, compiled by the Bureau of Standardization and Viticultural Service, published at the California State Printing Office in 1922, contains the name "Lady Fingers" as applied to grapes.

VIII.

Answering Interrogatory VIII, defendant, Ben H. Arkelian, states that he does not know the names and addresses of any persons, firms or corporations in the San Joaquin Valley, who employed the name "Lady Fingers" or "Lady's Finger" to grapes in the year 1883 or thereabouts.

BEN H. ARKELIAN.

Subscribed and sworn to before me this 30th day of November, 1927.

[Seal]

MATTHEW CONLEY,

Notary Public in and for said County and State.

[Endorsed]: Filed November 4th, 1927. [13]

[Title of Court and Cause.]

ANSWER TO BILL OF COMPLAINT FOR IN-
FRINGEMENT OF REGISTERED TRADE-
MARK.

Come now the above-named defendants and answering plaintiff's bill of complaint, deny, admit and allege as follows, to wit:

I.

Answering the allegations contained in paragraph II of said bill of complaint, defendant allege that Ben H. Arkelian & Co. is a copartnership consisting of Ben H. Arkelian, A. W. Phelps and A. S. Pilibos.

II.

Answering the allegations contained in paragraph IV thereof, defendants and each of them is without knowledge as to the matters and things alleged in said paragraph IV and for this reason the defendants and each of them deny each and every allegation thereof.

III.

Answering the allegations contained in paragraph V thereof, the defendants and each of them are without knowledge as to the matters and things alleged in said paragraph V and for that reason the defendants and each of them deny each and every allegation thereof.

IV.

Answering the allegations contained in paragraph VI thereof, the defendants and each of them are without knowledge as to the matters and things alleged in said paragraph VI and for that reason the defendants and each of them deny each and every allegation thereof.

V.

Answering the allegations contained in paragraph [14] VII thereof, the defendants and each of them are without knowledge as to the matters and things alleged in said paragraph VII and for that reason

the defendants and each of them deny each and every allegation thereof.

VI.

Answering the allegations contained in paragraph VIII thereof, the defendants and each of them are without knowledge as to the matters and things alleged in said paragraph VIII and for that reason the defendants and each of them deny each and every allegation thereof.

VII.

Answering the allegations contained in paragraph IX thereof, these defendants and each of them admit that they are sellers and dealers in grapes. In this connection defendants allege that they are now and for many years last past have been engaged in growing and producing large quantities of grapes in the State of California; that the grapes so grown and produced by them are of many varieties, including Muscats, Thompsons, Ladyfinger, Alicantes, Mission, Cornichon, Zinfandels, etc. That in addition to growing and producing said grapes these defendants have been and now are engaged in the business of buying, selling and shipping grapes and other fruits throughout the State of California and from the State of California to other states of the Union and there disposing of the same.

That they are the owners of a certain trade-mark known as "Enchantress" label or brand, under which their products are labelled, shipped and sold, a copy of which label is hereunto annexed, marked Exhibit "A," and made a part hereof; that the "Enchantress" brand of defendants' is a well

known and popular brand and products bearing this brand are in demand and meet with ready sale, and defendants are informed and believe and therefore allege that this fact was and is well known to plaintiff herein. [15]

These defendants admit that subsequent to the 22d day of July, 1924, they sold under "Enchantress" brand or label a variety of grapes known as "Lady Finger" grapes and that the "Enchantress" labels were stamped by a rubber stamp with the words "Lady Finger" on said labels; that the words "Lady Finger" are stamped on Exhibit "A" of this answer and were stamped with the same kind of a rubber stamp used by defendants in stamping the labels of all grapes of the "Lady Finger" variety shipped or sold by them since the 22d day of July, 1924. These defendants admit that they sold "Lady Finger" grapes in the State of California and in other states of the United States, and in this connection defendants alleged that each carton, crate or box of grapes was shipped under the "Enchantress" brand label and that the words "Lady Finger" were stamped on each label and that each carton, crate or box contained a variety of grapes known in California as "Lady Finger" grapes; that the stamping of the words "Lady Finger" on each label was made pursuant to and in accordance with the California Fruit, Nut and Vegetable Standardization Act of 1927, Statutes of 1927, Chapter 865.

Further answering paragraph IX of said bill of complaint, these defendants deny that the labels used upon said cartons, crates or boxes were calcu-

lated to deceive or were intended by the defendants to deceive and deny that the public was deceived in many instances or in any instance into the belief that in buying these grapes they were buying the grapes of this plaintiff or its predecessor. Defendants deny that great confusion or any confusion was created in the market or elsewhere as to the origin of these grapes. Defendants deny that by any act or acts of these defendants, [16] or either of them, this plaintiff or its predecessor was damaged in any sum whatsoever; defendants deny that any of the acts of defendants or either of them were an infringement of the rights or trade-marks of the plaintiff. These defendants deny that any sale of "Lady Finger" grapes made by them was made with the purpose or intention of injuring the plaintiff or its predecessor in interest in its or his business and/or divert to themselves any benefit or advantage which might have accrued to plaintiff or its predecessor in interest from the excellence and popularity or excellence or popularity of its grapes. In this connection defendants allege that the shipment and sale of "Lady Finger" grapes was made in the regular course of their business, after conforming with the requirements of law, and without any intention to injure or damage plaintiff in its business.

VIII.

Answering the allegations contained in paragraph X, defendants deny that they sold and offered, or sold or offered, said grapes for sale and so labelled them, or so labelled them, in infringement of the

registered trade-mark of plaintiff and its predecessor, or plaintiff or its predecessor. Defendants admit that they sold grapes under the "Enchantress" brand or label, stamped with a rubber stamp with the words "Lady Finger" in the Northern District of California and in commerce with other states. Defendants deny that by reason of any infringement of the trade-mark or other rights of plaintiff that any injury has resulted or will result to plaintiff's business.

IX.

Answering the allegations contained in paragraph XI, defendants deny that they used plaintiff's registered [17] trade-mark or put their grapes on the market as and for, or as or for, plaintiff's goods and deny that the use of the "Enchantress" brand with the words "Lady Finger" rubber stamped on said brand constitutes an infringement of plaintiff's lawful trade-mark or otherwise, and deny that the sale of said grapes by defendants as aforesaid is unfair and unlawful, or unfair or unlawful competition on the part of defendants and deny that the sale of grapes by defendants as set forth will cause irreparable loss and injury, or any loss or any injury to plaintiff.

X.

Defendants have no knowledge, information or belief sufficient to enable them to answer the allegations contained in paragraph XII and basing their denial on that ground deny that ever since the date of registration of said trade-mark the plaintiff and its predecessors, or plaintiff or its predecessors,

have given due notice of such registration to the public by marking upon the label bearing the trade-mark "Lady-Fingers" the words "Reg. U. S. Pat. Off."

Defendants admit that they received written notices from the plaintiff, complaining that defendants were infringing upon their trade-mark and requesting a discontinuance of the same, and defendants admit that they paid no attention to these notices for the reason that they had not been nor were they contemplating any infringement upon any trade-mark or any of the rights of this plaintiff, and they will continue to ship their grapes under their own label "Enchantress" brand, and defendants deny that any acts of theirs have in any manner damaged or injured plaintiff. [18]

As a first separate defense to plaintiff's bill of complaint, said defendants allege as follows, to wit:

I.

Defendants are informed and believe, and upon such information and belief allege that for over forty (40) years immediately last past a variety of grapes known as and called Ladyfinger grapes and Lady's Finger grapes has been grown, produced, marketed and sold in the State of California and in the several states of the United States and in foreign countries, and that the word "Ladyfinger" is the name given to a common known variety of green grapes grown and produced in the State of California and that the term "Ladyfinger" is descriptive of the said common and known variety

of grapes known by the name of Ladyfinger and Lady's Finger grapes. That said description is recognized as a proper and correct name of said variety of grapes, by the growers of said grapes in the State of California and by the California Department of Agriculture and the Bureau of Fruit and Vegetable Standardization of the State of California. That any trade-mark owned by the plaintiff consisting only of the words "Lady Fingers," issued by the United States Patent Office or the Commissioner of Patents, was issued contrary to the provisions of Section 5 of an Act of Congress entitled, "an act to authorize the registration of trade-marks used in commerce with foreign nations or among the several states or with Indian tribes and to protect the same" (Act of February 20, 1905, Chapter 592, 33 Stat. L. 724 and 725, and amendments supplementary thereof and amendatory thereto), and is therefore void and of no force or effect. [19]

As a second separate defense to plaintiff's bill of complaint, said defendants allege as follows, to wit:

I.

Defendant Ben H. Arkelian alleges that for thirty (30) years immediately last past, to said defendant's knowledge, a variety of grapes known as and called Ladyfinger grapes have been grown and produced in the State of California, and that word "Ladyfinger" is the name given to a common variety of green grapes grown and produced in the State of California. That the said variety

of grapes known as Ladyfinger grapes are whitish in color and are long and thin; that by over thirty years' use of said name "Ladyfinger" in describing said variety of grapes, said word has acquired a generic meaning and has become merely a generic name descriptive of a particular quality, class and variety of grapes, and that said name "Ladyfinger" is *publici juris* for that purpose and in that sense, and is not a proper name for an exclusive trade-mark.

As a third separate defense to plaintiff's bill of complaint, said defendants allege as follows, to wit:

I.

Defendants are informed and believe and upon such information and belief allege that for over forty (40) years last past a variety of grapes known as and called Ladyfinger grapes and Lady's Finger grapes, has been grown, produced, marketed and sold in the State of California and in the several states of the United States and in foreign countries and that the word "Ladyfinger" is the name given to a common variety of green grapes grown and produced in [20] the State of California, which said grapes are whitish in color and are long and thin. That the term "Ladyfinger" is descriptive of said common and known variety of grapes known by the name "Ladyfinger" and "Lady's Finger" grapes, and that the said terms "Ladyfinger" and "Lady's Finger" grapes have been used for many years last past by wholesalers, retailers and consumers of said grapes in the State of California, the

several states of the United States and in foreign countries. That said description is recognized as a proper and correct name of said variety of grapes by the growers of said grapes, by the wholesalers and retailers of said grapes, and by the general public who use said grapes, and by the California Department of Agriculture and the Bureau of Fruit and Vegetable Standardization of the State of California; that the said plaintiff has not exclusively used the word Ladyfinger to describe green grapes grown and produced in California during the past thirty years. Defendants are so informed and believe, and therefore allege, that said plaintiff and plaintiff's predecessors in interest have sold Ladyfinger grapes under the trade name of "Humphrey's Lady Fingers" and that the wholesalers and retailers of the grapes and the public at large who purchased Ladyfingers grapes are not deceived by the fact that the defendants sell grapes under the "Enchantress" brand marked Ladyfinger grapes. That the said defendants have never sold Ladyfinger grapes under the "Enchantress" brand with intent to deceive, or have they deceived the wholesalers and retailers of said grapes or the public at large into believing that the said Ladyfinger grapes of the defendants sold under the "Enchantress" brand were or are the Ladyfinger grapes produced by the plaintiff or plaintiff's predecessors in interest. [21]

WHEREFORE, defendants pray that plaintiff take nothing by reason of its bill of complaint and that the same be dismissed; that defendants recover

their costs of suit incurred herein and that this Court adjudge and declare plaintiff's trade-mark void in whole and that the said certificate of registration be delivered up to the Commissioner of Patents at Washington, D. C. for cancellation, and for such other and further relief as to this Court may seem meet and agreeable to equity.

BEN H. ARKELIAN,
BEN H. ARKELIAN & Co.,
By BEN H. ARKELIAN,
Defendants.

Attorney for Defendants. [22]

State of California,
County of Fresno,—ss.

Ben H. Arkelian, being first duly sworn on oath, deposes and says: That he is one of the defendants above named; that he has read the foregoing answer and knows the contents thereof and that the same is true of his own knowledge, except as to those matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

BEN H. ARKELIAN.

Subscribed and sworn to before me this 8th day of October, 1927.

[Seal] PHILIP CONLEY,
Notary Public in and for said County and State.
[23]

13



...ent
...ybsl

Receipt of copy of within admitted Oct. 10, 1927.

CHAS. E. TOWNSEND,

WM. A. LOFTUS,

For Defendant.

[Endorsed]: Filed Oct. 10, 1927. [24]

[Title of Court and Cause.]

AMENDMENT TO ANSWER TO BILL OF
COMPLAINT FOR INFRINGEMENT OF
REGISTERED TRADE-MARK.

Come now the defendants above named, and, leave of Court having been first had and obtained, file this their amendment to their answer on file herein, and amend said answer by adding the following defense thereto:

As and for a fourth separate defense to plaintiff's bill of complaint, said defendants allege as follows, to wit:

I.

That said defendants are informed, through the allegations contained in plaintiff's bill of complaint, and believe and therefore allege, that the predecessor in interest of the said plaintiff began growing, shipping and selling grapes under the name and designation of "Lady Fingers" in or about the year 1895, and that the predecessor in interest of the said plaintiff did not apply for, or secure the issuance to him of, a trade-mark on said words "Lady Fingers" until in or about the year

1924. That between the time when the said predecessor in interest or plaintiff began to grow and ship the said grapes under said designation and the time when the said trade-mark was applied for and issued, these answering defendants and sundry other shippers and growers of grapes in the State of California adopted and used, in connection with the production and sale in intrastate and interstate commerce, the words "Lady Finger" and "Lady's Finger" and "Lady Fingers," as the name and designation of a certain variety of grapes grown, produced, shipped and sold by said defendants and by said sundry other persons. That said defendants are informed [25] and believe, and therefore allege, that the predecessor in interest of plaintiff, and plaintiff herein, during all of said times, well knew that said defendants and said other persons were growing, producing, shipping and selling said certain variety of grapes under the name and designation aforesaid, and that said defendant and said other persons did, during said time, build up a market for the sale of grapes so designated and did effect advertising of grapes so designated and expended moneys in so building up a sale for their own grapes named and designated as aforesaid and in advertising their said grapes through labels on the boxes containing the same, and through other means.

That said defendants and said sundry other persons in so advertising acted in good faith and under the belief that they and each of them were rightfully and legitimately using said name and desig-

nation for their said grapes so grown, produced, shipped and sold as aforesaid. That said acts of said defendants and said other persons were done openly and notoriously, and the said facts were at all times and are now known generally to the grape trade.

Defendants are informed and believe, and placing their allegations on said ground allege that notwithstanding said facts, neither plaintiff nor plaintiff's predecessor in interest at any time or at all prior to the issuance of said trade-mark made any protest to said defendants or either of them or said sundry other persons concerning the use by defendants and by said other persons of said name and designation for said variety of grapes grown, produced, shipped and sold by defendants and said other persons. That the application of said plaintiff's [26] assignor for said trade-mark was made without the actual knowledge, and was made without the consent, of defendants or either of them.

That by reason of the foregoing facts, said plaintiff is estopped from now seeking to interfere with the said use by said defendants of said names in connection with the growing, shipping and selling of their grapes, and the said plaintiff is barred from any recovery herein by the laches of itself and of its predecessor in interest.

WHEREFORE, said defendants pray judgment in accordance with the prayer set out in the answer.

BEN H. ARKELIAN,

BEN H. ARKELIAN & CO.,

By BEN H. ARKELIAN,

Defendants.

CONLEY, CONLEY & CONLEY,

Attorneys for Defendants. [27]

State of California,

City and County of San Francisco,—ss.

Ben H. Arkelian, being first duly sworn, on oath deposes and says:

That he is one of the defendants above named; that he has read the foregoing amendment to answer and knows the contents thereof and that the same is true of his own knowledge, except as to those matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

BEN H. ARKELIAN.

Subscribed and sworn to before me this 23d day of May, 1928.

[Seal]

MARY F. REDDING,

Notary Public in and for Said City and County and State.

My commission expires July 14, 1929.

Copy received May 23, 1928.

WM. A. LOFTUS,

Attorney for Plaintiff.

[Endorsed]: Filed May 23, 1928. [28]

[Title of Court and Cause.]

MEMORANDUM OPINION.

ST. SURE, D. J.—It is ordered that defendants have judgment as prayed.

July 16, 1928.

[Endorsed]: Filed Jul. 16, 1928. [29]

In the District Court of the United States for the
Northern District of California, Southern Division.

IN EQUITY—No. 1951-S.

A. B. HUMPHREY COMPANY,

Plaintiff,

vs.

BEN H. ARKELIAN and BEN H. ARKELIAN
& CO.,

Defendants.

DECREE.

This cause came on to be heard at this term and was argued by counsel, and thereupon, upon consideration thereof, it was ORDERED, ADJUDGED AND DECREED as follows:

(1) That plaintiff is not entitled to any relief whatever, and shall take nothing by reason of this suit.

(2) That the trade-mark, to wit, "Lady Fingers" now claimed by plaintiff and registered in

the United States Patent Office by A. B. Humphrey, and the certificate of registration of said trade-mark, which is numbered 186,739, and which was issued by the Patent Office of the United States at Washington, D. C. on the 22d day of July, 1924, to the said A. B. Humphrey, are and each of them is void and of no force or effect.

(3) That defendants do have and recover from the plaintiff their costs and disbursements incurred in this suit, and taxed at \$——.

Dated this 8th day of August, 1928.

A. F. ST. SURE,
District Judge.

[Endorsed]: Filed and entered August 10th, 1928. [30]

[Title of Court and Cause.]

CONDENSED STATEMENT OF PROCEEDINGS BEFORE UNITED STATES DISTRICT COURT, AND NARRATIVE OF TESTIMONY PURSUANT TO EQUITY RULE 75.

San Francisco, California, Wednesday,
May 23, 1928.

Before Honorable A. F. ST. SURE, U. S. District
Judge.

For Plaintiff: Messrs. CHAS. E. TOWNSEND
and WM. A. LOFTUS, By WM. A. LOFTUS,
Esq.

For Defendants: Messrs. CONLEY, CONLEY & CONLEY, By WM. CONLEY and MATHEW CONLEY, Esqs.

The case being called and counsel answering "Ready," Mr. Loftus, on behalf of plaintiff, made a brief opening statement to the effect that this is a trade-mark infringement suit; that the plaintiff's mark has been registered in the United States Patent Office, the application therefor being filed in April, 1924, and granted July 26, 1924, after due examination on the part of the Patent Office officials, and after the trade-mark had been published for 30 days in the "Patent Office Gazette." The certificate of registration is numbered 186,739 and covers the claimed name [31] "Lady Fingers" as applied to fresh grapes.

Thereupon Mr. W. M. Conley, on behalf of defendants, made a brief statement to the effect that he did not care to make any statement at this time, but that out of an abundance of caution, defendants desired to file an amendment to the answer, setting up laches as an estoppel. A copy having been served on plaintiff, and no objection being made thereto, the amendment to the answer was allowed to be filed.

(The certified copy of the registration of trade-mark in question was thereupon marked Plaintiff's Exhibit 1.)

Thereupon Mr. A. B. HUMPHREY, a witness for plaintiff, was called to the stand.

TESTIMONY OF A. B. HUMPHREY, FOR
PLAINTIFF.

A. B. HUMPHREY, called on behalf of the plaintiff, after being first duly sworn, testified as follows:

I am a general agriculturist, 65 years of age, and reside in Sacramento County. I am president of the A. B. Humphrey Company, a corporation organized under the laws of the State of California in 1918 or 1917. The corporation does a general agriculture business, including the growing of grapes; all varieties, practically, or many of the old varieties of table grapes. The grapes are shipped in the green state entirely, to all the large markets—practically all of the large auction markets of the east; also to some of the cash markets, f. o. b. markets, on the coast, and in the east also.

Prior to organizing the A. B. Humphrey Company, I carried on a similar business under the name of "A. B. Humphrey." The grapes grown and shipped by the plaintiff are raised in Sacramento [32] and San Joaquin Counties. The plaintiff employs or uses the trade-mark or trade name "Lady Fingers" in the shipping of one kind of grape. I obtained the "Lady Finger" grape without knowing what grape it was, in the winter of 1893 and the spring of 1894.

The COURT.—When did you first use the name "Lady Fingers"?

(Testimony of A. B. Humphrey.)

A. I first used the name "Lady Fingers" in '95, when I saw the first bunch of grapes.

Mr. LOFTUS.—Q. How did you come to adopt that name?

A. It took me two years from the original vine that I got, which was a very small planting, evidently raised by the layering plan, which means, digging the buds out of the wood and planting them in a hotbed. That is done where there is a scarcity of the product which you wish to produce; and evidently these grapes had been layered each one from a separate bud, because there was only a small supply available. I got them in moss and I had to use care to prevent losing them in the moss because they were so small. I immediately recognized the fact that they were too small to propagate out in a vineyard under regular methods—

The COURT.—(Interrupting.) What has this got to do with the use of the word "Lady Fingers"?

Mr. LOFTUS.—(To the Reporter.) Read the question, please.

(Question read by reporter.)

A. Well, as I say, the first two years it took me to find out what this grape was; it took a year to get the wood to graft into another vine; it took another year for it to grow and it took another year for it to produce grapes.

The COURT.—Is that what you call "Lady Finger" grapes?

A. Yes. I was around in the vineyard and saw not only the grape itself but the shape of the bunch

(Testimony of A. B. Humphrey.)

and the shape of the grape and that immediately suggested to my mind "Lady Fingers" and [33] I said to myself and also announced it to other people, "I am going to follow this grape up and propagate it and if it has the merit and other qualities for shipping, I am going to propagate it and call it 'Lady Fingers.'" I made that decision in 1895. Prior to that time I had never heard of the name "Lady Fingers" applied to grapes of any kind. I first shipped these grapes in 1898 and 1899. I sent a sample, and wrote on it "Lady Fingers," to my agent in the east, asking for an opinion; and from that time on I used a stamp and stamped them "Lady Fingers." I got them in increased quantities from then on every year. I have continued to ship these grapes since that time and I always employed the name "Lady Fingers" in connection therewith.

Q. I show you a label and will ask you if it is the label used by you.

A. That is the label I use on the cover of my crates. It is applied to all packages.

Mr. LOFTUS.—I offer this label in evidence.

(The label was received in evidence and marked Plaintiff's Exhibit No. 2.)

I advertise the "Lady Finger" brand of grapes by sending out what we call broadsides to the trade immediately before the season opens, through the east to the dealers, to the auction buyers, to the large chain stores, to the wholesale dealers and jobbers in the auction markets in the east.

(Testimony of A. B. Humphrey.)

Q. Can you produce some of these so-called broadsides here?

The COURT.—Oh, I suppose it will be admitted he advertised this grape throughout the east as “Lady Finger” grapes?

Mr. CONLEY.—That is admitted,—as Humphrey’s Lady Fingers.

The COURT.—That is what the sign says,—I can read it from here. [34]

Mr. LOFTUS.—The advertising, however, doesn’t say anything about Humphrey’s name.

The COURT.—Well, it says Lady Fingers on there.

Mr. LOFTUS.—Q. Please identify those so-called broadsides, if you can.

A. I do. They come out every year different, with a letter. The two I have just referred to, two so-called broadsides, are sent out one one year and one another.

Mr. LOFTUS.—I offer these two circulars in evidence.

(The two circulars were thereupon received in evidence, marked Plaintiff’s Exhibit No. 3.)

I don’t know by what name the grape was known when I first started the production of these grapes. If it had a name I had never seen it myself. I identified it as about one of 60 varieties of grapes that I had gathered up in an experimental way, seeking to find some new variety of grape with merit. I am not quite sure whether I obtained the vines or cuttings from which I produced the particular grape

(Testimony of A. B. Humphrey.)

from the Department of Agriculture in Washington or whether it came from the University of California. It came, I think, from one of those two sources.

It is contended that this grape is a Persian variety. That I have learned since this controversy arose. The grapes are shipped in carloads to Chicago, New York and other auction markets and sold at auction; or, in some cases, they are shipped to jobbers who represent me and sell them out to the dealers in small quantities.

Q. Then how does the dealer dispose of them?

The COURT.—What difference does that make?

Mr. LOFTUS.—That, I think, is a very material point, your Honor, showing, as we will show later, the chance for deception of the trade, to the manner in which these grapes are sold, your Honor.
[35]

The COURT.—The whole question here is whether or not he had a right to use the name “Lady Fingers.”

Mr. LOFTUS.—That is, whether the defendant has a right.

The COURT.—Yes.

Mr. LOFTUS.—And that would determine whether or not the defendants’ use of this name would tend to deceive the public.

The COURT.—Do I understand that this is a suit for unfair competition?

Mr. LOFTUS.—That is always connected with a trade-mark infringement and there is an allega-

(Testimony of A. B. Humphrey.)

tion in the complaint as to unfair competition and deception of the public; but in every trade-mark case, unfair competition enters into any case of a trade-mark infringement. That is only one phase of a trade-mark controversy, as your Honor well knows.

The COURT.—It seems to me this case is going to hinge on the one point made by Judge Conley, and that is whether or not this name was a well-known and well-recognized name of a certain variety of grape.

Mr. LOFTUS.—That is, whether it was well known at the time the plaintiff adopted it; not at the time of registering it, because he can take his own time registering it.

The WITNESS.—I first learned of others than myself employing the name “Lady Fingers” on or in connection with grapes, when I began to advertise this variety within the last six or seven years—since 1918 and 1920. Prior to that time I never heard of anyone other than myself using this name “Lady Fingers” on or in connection with grapes. I first heard of the use of the name “Lady Fingers” by the defendants Ben H. Arkelian and Ben H. Arkelian & Company within the last three years. Upon hearing that, I notified Ben H. Arkelian by letter that I had a United States Government trade-mark [36] and asked him to cease using the name “Lady Fingers” in connection with grapes. At that time he was shipping carloads; in one case that I recall, to Chicago and to Pittsburgh, and to the northwest—Portland.

(Testimony of A. B. Humphrey.)

After these larger shipments of "Lady Finger" grapes by the defendant I noted a change in my business. In one case I had made a sale of five cars, I recall, to a cash buyer, and he had expected to handle them exclusively in the market, and he notified me before the first car came in that defendant was quoting a car through his agent in the market which would arrive the same day or possibly the day before, priced on arrival, which is a common practice in the trade. My representative in that market notified me that as far as they could find out the price would be about 25 cents less per package than they had paid me, and they asked me what to do in the premises and protested; and the outcome of that was that I was compelled finally to make them a concession of 25 cents a package on the five cars.

The illustration on the label, Exhibit 2, is a correct representation in general of the appearance of a large percentage of the grapes as they are packed day by day, and which I sell under the name "Lady Fingers." Some bunches are smaller and some bunches are larger.

Aside from my own company and the defendant here, there are a number of other concerns producing a similar appearing grape—in fact, all of the large companies have to ship similar grapes, and, as far as I know, the same grape, and I have notified them, where I find it out in every case, to cease using the name, and in every case they have

(Testimony of A. B. Humphrey.)

ceased using the name. They call them, in some cases I know of, "Rish Baba."

I never sold any cuttings from this grape of mine. [37]

The COURT.—Q. There are a lot of that type of grape grown in the State, aren't there?

A. They are, in small quantities. I control, as near as I can determine, about 90 per cent of the product. I have never refused to give cuttings of the grape,—make a present of the grape to anyone that is interested,—in small quantities.

Mr. CONLEY.—Just a minute, please; I would like to understand that last answer,—he has never refused to give the grape to anyone interested, in small quantities; is that what you said?

A. When this grape began to be known, people wrote to me and asked me to sell them cuttings. I wrote to them in every case that the "Lady Finger" grape is not for sale, but anyone interested in experimenting in varieties of grapes I would be very pleased to give them 100 per cent more than I started with 25 or 30 years previous. I received inquiries back how much that would be and answered "two cuttings"; that I started with one. That generally meant that I never heard from them again. Some came back and said they would be pleased to have them. Every year I have sent out from a half to a dozen samples to people who have asked for them; but I never have sold them.

Mr. LOFTUS.—Q. What is this label, if you know?

(Testimony of A. B. Humphrey.)

A. Well, this is a label that is put on the crates using the name "Lady Fingers" under this "Enchantress" Brand. My agents have always notified me where that appeared in the markets.

Mr. LOFTUS.—I offer this in evidence, and it is stipulated that this is the label used by the defendants.

(The label was thereupon received in evidence, marked Plaintiff's Exhibit Number 4.)

Mr. LOFTUS.—And I call the Court's attention to the stamp down in the corner, the name "Lady Fingers." I think that is all from Mr. Humphrey for the present. [38]

Cross-examination.

I have been in the grape business since '89, commercially, in a large scale. I now have very close to 300 acres growing "Lady Finger" grapes. I did not say that that is 90 per cent of the "Lady Finger" grapes that are grown in California. I said I thought I controlled 90 per cent of the shipments. The cuttings that I got in '93 or '94 came from the Department of Agriculture at Berkeley, or the Department of Agriculture at Washington. At that time there was no department of the University at Davis.

Mr. CONLEY.—Now, let me refresh your recollection. Didn't you get that from Pomona?

A. No. I am certain that I never got them from Pomona. The cuttings from amongst which I got this grape, as I say, either came from the De-

(Testimony of A. B. Humphrey.)

partment of Agriculture at Washington or from the Department of Agriculture at the University of California at Berkeley.

Q. Have you ever had any dealings with the Pomona Nursery?

A. You mean the Armstrong Nursery?

Q. Yes.

A. I bought all of his trees and other varieties of grapes, and I also gathered up a number of varieties of grapes from different sources, from nurserymen in the State. I worked in the nursery business myself for a number of years.

When I received these cuttings I discarded the names in this particular lot, as I remember it, because they were so unpronounceable that I couldn't remember them, and I put numbers on them,—1 to 10 on the first shipment, and the second year, from 1 to 20; and I copied the names in a book and I kept it for years; but my house burned up and the book was destroyed. I never used the names. I don't remember the particular name that was on the cutting of this particular grape. I am certain that the name "Lady Finger" [39] never appeared on those cuttings. I never had heard of the name "Lady Finger" before that.

Q. And you didn't know that before that time vineyardists in this state were raising this same variety of grape and selling them?

A. I had never heard of a grape named "Lady Fingers."

Q. Were you ever out at Escalon?

(Testimony of A. B. Humphrey.)

A. I owned a ranch at Lindsay all the time, and was in and out of that district a good deal.

I have been on the Eisemann vineyard, but I never saw any "Lady Fingers." I went over that vineyard on one occasion with Mr. Rennie, a well-known vineyardist in Fresno, but I never saw a "Lady Finger" grape or heard of a "Lady Finger" grape being grown there.

I never made any inquiry to find out whether or not that variety of grape was being grown. It didn't occur to me that there was. I was not raising grapes at Escalon. The grapes were propagated at Sacramento, Mayhews, at Mayhews.

I named the product of the vine, the bunch of grapes, "Lady Fingers," from the time I saw the first bunch, and told others about it, too. I never saw a bunch of grapes like that before. It was a new variety of grape to me. I denominated this grape "Lady Finger" in '96. I grafted the vine in the winter of '94. I nursed the wood and got a bunch of grapes the second year, in '96. I saw the first bunch in '96 and made the first shipments in 1899.

Before that I had been in the San Joaquin Valley, but I never saw any grapes that looked like or resembled the appearance of the grapes which I named "Lady Finger." I never saw a grape known as "Rish Baba." I never saw the grape known as "Pizzultello di Roma" growing on the vines, but I saw them in the cars; and they [40] were not marked either "Rish Baba" or "Lady

(Testimony of A. B. Humphrey.)

Fingers,"—never. They were marked "White Cornichons." I saw them marked "White Cornichons" years afterward. I never saw the "Olivette Blanche" grape before I started raising these grapes. A number of years afterward I saw them in the market.

Mr. LOFTUS.—I object to this line of examination. It does not touch on the issues at all. It has nothing to do with the issues of the case.

The COURT.—It may be it is a grape similar in appearance. I don't know. I suppose it is or the question would not have been asked.

Mr. LOFTUS.—It is the name we are interested in; not the appearance of the grape. Mr. Humphrey claims that he originated the name.

The COURT.—The question has been answered. Overruled.

The WITNESS.—I had seen white varieties of grapes in California before I grafted the so-called "Lady Fingers," on my own ranch. I had "Sweetwaters," which is a small, round, white grape. I shipped them. Malagas I had seen. I raised Muscats also. They are all white varieties; but nothing resembling my grapes.

Q. Before you applied the name "Lady Finger" to this grape—and I want you to answer this question—did you ever see any grapes growing in California known as the "Rish Baba," "Pizzultello di Roma," "Khandahar" or "Olivette Blanche"?

A. Never.

(Testimony of A. B. Humphrey.)

Mr. LOFTUS.—That is objected to as immaterial—

The COURT.—It is answered, Counsel.

Mr. LOFTUS.—Exception.

The WITNESS.—I am a producer, as well as a seller of grapes. Since '93 I have made a study of the different varieties of grapes, their origins. Since this controversy arose I have [41] made quite a study of the parent plant of the so-called "Lady Finger" variety.

Q. Didn't you find that in Persia, Turkey, and Jugo-Slovakia they raise the same variety of grapes known by the name of "Lady Fingers," or "Lady Finger" grapes?

A. If they are called "Lady Fingers" it is in a foreign name and I didn't recognize it, Mr. Conley.

I have bought many grape cuttings, but never bought any in a foreign land. I have heard the names Muscats, Zinfandels, and Missions. They have been propagated ever since I have been in the grape business.

Q. You have said in your answer, in substance, in other words, you charged the defendant in this action with a fraudulent imitation of your brand. I believe that is the substance of your allegation whereby you have been injured and damaged in the markets in the east and in California. Will you point out to the Court and tell the Court where the imitation is between these two labels that would

(Testimony of A. B. Humphrey.)

deceive anyone? (Handing two labels to the witness.)

A. This (referring to one label) is recent. This is exactly as I handled them up to the time I began to advertise and got a trade-mark and when I got the trade-mark and began to advertise like this (referring to another label), people began to mark "Lady Finger" on every variety of grape that was longer than was wide. This (referring to label) is exactly the way I marked them on the end of the box with a rubber stamp. I have done that for 20 years and over.

Q. Did you have the term "Enchantress Brand" on there?

A. I did not. I had "Lady Fingers" on there, on the end of the box, with my own name, just like it is on this one. (Indicating label.) [42]

Q. If you had never heard of the term "Lady Finger" before you applied it to that grape, why is it you put the term, the name, Humphrey Lady Fingers on there, on this label? Why did you use the term "Humphrey" on there?

A. I used it for this reason. My brand is known in the East,—and I know that by going East and talking with the people—my brand is known as the big black brand. That means, that in place of having a paper label pasted on the end of the box I brand and print on the end of the wood in large letters, "A. B. Humphrey, Grower and Packer." Then I stamp the variety on the end of the box. Now, when I got the trade-mark and started to

(Testimony of A. B. Humphrey.)

spend money to advertise this variety I followed out the idea, in addition to having this printed label, of putting on the end of the box my name and the name of the variety, because, naturally, the box top gets separated from the package itself. When they take the cover off they put it to one side and they will see this label, and they have made it a practice lately of hanging that up on the wall, and, as you will see, it is marked "Humphrey's Lady Fingers."

Q. Is there anybody to your knowledge that has ever told you that he was deceived by this brand into believing that he was buying your grapes, your "Lady Fingers"?

A. I can't say as I have ever raised that question with anybody, Mr. Conley.

Q. Well, I will ask you what is the fact in that matter?

A. The fact is, as I say, I haven't had occasion to discuss that matter.

Q. Then the statement in your answer that people were deceived by buying this brand of grapes under the Enchantress Brand is not true; isn't that it?

Mr. LOFTUS.—Just a minute. Point out what part of it [43] you are talking about. Are you talking about the answer or the complaint, Mr. Conley?

Mr. CONLEY.—The complaint, rather.

Mr. LOFTUS.—The allegation is that people would be likely to be deceived.

The COURT.—I don't see how they would be likely to be deceived by that Enchantress label. The

(Testimony of A. B. Humphrey.)

only issue here is as to the use of the word "Lady Fingers."

Mr. LOFTUS.—Yes, your Honor.

The COURT.—The label is entirely different.

Mr. LOFTUS.—And you can see by the label that they have made use of a registered trade-mark.

Mr. CONLEY.—I don't know whether to treat this as an argument or pleading of fact.

Q. Look at Paragraph 8 of the complaint, Mr. Humphrey. (Handing document to witness.)

A. Yes; I can answer that.

Q. Is that true? A. It is true, yes.

Q. Then, as I understand your answer it is this: That, in your opinion, this label so closely resembles the label you use that the dealer would be likely to be deceived.

The COURT.—That is marked what?

Mr. LOFTUS.—"Enchantress Brand" is the mark. The registered mark is "Lady Fingers."

Mr. CONLEY.—I would like to call the Court's attention to the allegation in Paragraph 9. There is a straight allegation of fact there. (Handing document to the Court.)

The WITNESS.—I can explain, your Honor, where that would be a deception. [44]

The COURT.—Well, the only deception, if any, would be the use of the word "Lady Finger." Wouldn't that be so? There is no similarity whatever between the Enchantress label and the label you use, is there? So that the only deception, if any, would be the use of the word "Lady Finger."

(Testimony of A. B. Humphrey.)

The WITNESS.—If the Enchantress label carried the word “Lady Fingers” and the long variety of grapes was in there it would be a distinct loss, which has been the case many times.

Mr. CONLEY.—Q. Now, I will ask you if you know of a single case in all these years where anybody has ever been deceived into thinking he was buying your grapes when the grapes that were bought bore the Enchantress Brand mark Lady Fingers just as this exhibit shows?

A. My representatives in markets have written me saying that there were other “Lady Fingers” in the market—

Mr. CONLEY.—I move to strike that out, your Honor.

The COURT.—It may go out.

Mr. LOFTUS.—It is an answer to your question.

The COURT.—Q. Did they say that there were other brands of “Lady Fingers” in the market?

A. Yes, and that the party was deceived because they couldn’t distinguish them without eating them.

Mr. CONLEY.—Q. Were they the same variety of grapes?

A. In a great many cases they were not.

Q. How do you know?

A. They were sent to me with the original boxes, —bought and sent to me and they carried the word “Lady Fingers” and they proved to be a different variety of grape from any other grape,—either Rish Baba or from my kind of grapes or any other grapes that I know of. [45]

(Testimony of A. B. Humphrey.)

Q. Did you ever get any letter from anyone in which it was stated he had made a purchase and had been deceived, believing the grapes were Humphrey Lady Fingers?

A. The retail dealer—

Q. Now you may answer that question “yes” or “no.”

A. No. The retail dealer don’t communicate with the grower. They have no method of doing so.

Q. Now, you say you have frequently given cuttings of these so-called Lady Finger vines of different people in California?

A. I have never refused to do so, but I have never given them to anyone without their asking for them.
[46]

On an average of from three to six people each year have written me asking for cuttings of the so-called “Lady Finger” vines, and I have given two cuttings to anyone who asked for them. They were notified that they could not call them “Lady Fingers.”

I know of two instances of parties very close to me who are raising grapes from these cuttings. One of them is my neighbor with whom I was associated in business for twenty years. His name—It is known as the R. A. Stevens Corporation now. They raise and ship probably two or three carloads a year.

Mr. G. Winkelman, who worked for me for more than 20 years, and who resides close to me, annually grows from a thousand to two thousand crates,

(Testimony of A. B. Humphrey.)

—one or two cars; but he sells them with me in my cars.

Mr. Cunningham, who lives close to my original planting, has probably two hundred vines, and sells the product of those two hundred vines.

Q. Over in Stanislaus County are they not raising this same variety of “Lady Finger” grapes?

Mr. LOFTUS.—I object to this line of examination, if the Court please; it doesn’t touch on the name at all. He is asking how many cars of this variety of grape is being raised and sold, but nothing whatever concerning the use of this trade name.

The COURT.—I don’t see the materiality of it.

Mr. CONLEY.—Well, as I understand the law, your Honor, if he sells or disposes of these grapes or cuttings that the purchaser or anybody else to whom he has sold cuttings has a right to use that term “Lady Finger.”

Mr. LOFTUS.—Providing he sold the cuttings under that name.

The WITNESS.—I never sold the cuttings.

Mr. CONLEY.—You gave them away under that name, did you?

A. Yes. [47]

Q. And they are producing them under that name? A. Yes.

Q. And do you know whether they gave any of them away, any cuttings, or sold any of them?

A. I don’t know, and I don’t care.

Q. Have you ever been informed as to whether or not they have?

(Testimony of A. B. Humphrey.)

A. I never have. My opinion is that they do not.

Q. But you don't know, do you? A. No.

Q. Are there any of this variety of grapes grown in the Sacramento Valley,—Sacramento County?

Mr. LOFTUS.—Same objection.

The COURT.—Overruled. If you know.

The WITNESS.—Pardon me.

The COURT.—Q. If you know.

A. These parties that I mentioned are in Sacramento County.

Mr. CONLEY.—Q. Are there any of this variety of grapes grown in the San Joaquin Valley?

A. I don't know.

Q. Are you the only producer of this variety of grape in the Sacramento Valley, "Lady Finger" grapes? A. As far as I know.

Q. Are there any raised in Sutter County?

A. If there are, I don't know of it.

Q. Any in Fresno County?

A. I can't say that I know they are.

Q. Any in Kern County?

A. I have been told that in the last few years, since this came up, that there are people who are raising and shipping "Lady Finger" grapes to some extent up in Kern County.

I have been on the Arkelian place. I did not know he was raising these grapes, except from hearsay. His man showed me the grapes, the vines; they were too young, though, for me to know what [48] they were; but his exact words

(Testimony of A. B. Humphrey.)

were, "This is the so-called Lady Finger." I couldn't tell by looking at them whether there were any grapes on the vine or not. I didn't know whether he had authority to say what he was saying. He was a hired man and there was nobody else on the ranch. That was within the last four or five years.

Q. You know, do you not, that they have been raising this same variety of grapes in California and selling them under the name of "Lady Fingers" for the last ten years, don't you? A. No.

Q. Are you certain about that?

A. Well, the people I gave them to, I know they have been raising them.

Q. I mean anybody else. Haven't you known that many people have been raising and shipping and selling those grapes under the name of "Lady Finger" grapes in this state for over ten years?

A. Not until this matter came up.

Q. I didn't ask you that. Answer the question.

Mr. LOFTUS.—This is objected to, your Honor, as referring to dates long subsequent to the use of this trade-mark.

The WITNESS.—I was induced to get out a trade-mark for that very reason.

Mr. CONLEY.—Q. When were you first informed that they were selling and growing grapes under that name?

A. Through my agents in the east.

Q. When?

A. In 1918 and 1920. For two or three years

(Testimony of A. B. Humphrey.)

I submitted it to them before I got out the trademark.

Q. And you never heard of it before?

A. Never.

The WITNESS.—(Continuing.) I can't say that I know Mr. W. Flanders Setchel. I have seen that man. I never had any conversation with him at any time with reference to the growing and selling of "Lady Finger" grapes. [49]

Q. You never did. Now, let me refresh your memory. Do you remember being in Sacramento in 1918 at a gathering of fruit men, a kind of an emergency call of all the fruit men in the State, where they had a conference or a convention?

A. No.

Q. Were you there?

A. I don't think I was there.

Q. In 1918?

A. I don't think there was any. I don't think I was there.

Q. In reference to the labor question in connection with vineyards? That is a matter I have reference to.

A. There have been numbers of conferences; I wouldn't say whether I was at that particular conference in 1918.

Q. Will you stand up, Mr. Setchel? This is the gentleman to whom I refer. Did you have any conversation with him in 1918 in Sacramento at a hall which is down the street—I think it is K Street—in Sacramento, other people being present, whose

(Testimony of A. B. Humphrey.)

names I can't now recall, in which you had a conversation about the selling and raising of "Lady Finger" grapes? A. Never.

Q. You never did? A. No.

Q. Now, I will ask you if you didn't tell Mr. Setchel everyone was raising and selling them in California, but they couldn't do that, as you had invented the name?

A. I never said that. I never made any such statement as that,—I never made any statement like that to anybody.

Q. Do you take the current fruit periodicals?

A. I read the "Rural Press." Somebody might have sent me a catalogue and I looked at it. I may have seen the work, "California Horticulturist," but I don't recall. I know Mr. George C. Roeding. I have done business with him. I can't say that I examined his catalogues specially to see whether or not "Lady Fingers" were catalogued by him, although I might have done so. I have had [50] a conversation with Mr. Roeding on "Lady Fingers" within the last five or six years.

Q. Well, he informed you, didn't he, that he had been selling this same variety of grapes as "Lady Finger" grapes in Fresno since 1900, didn't he?

A. No, he never did.

Q. What did he say about that?

A. There was so much demand for "Lady Finger" wood from me that I considered distributing it, and Mr. Roeding was the President of the State Board of Agriculture, and I used to meet him at

(Testimony of A. B. Humphrey.)

the fairs. I usually showed at the fairs; and I said to him one day, "Would you consider taking my 'Lady Finger' wood exclusively and selling it?" and he said, "I will think it over. We would have to get out some advertising," and we talked it over in a general way during the fair. It was the State Fair season, and that is a pretty busy one. I do remember having one or two conversations with him. However, nothing definite ever came out of it. That was within the last four or five years—about the time I got the trade-mark.

Only in one make of the dictionary did I find exactly what you allege, that "Lady Finger" was a name given to a variety of grape; but it was a late issue of the dictionary,—1920, I think it was. I had been raising the grape for 25 or 30 years then.

I don't think I ever saw this publication by Mr. George C. Roeding, or one like it, published in 1909. This seems to be a specialty book. I had nothing to do with Mr. Roeding with the exception of his regular commercial catalogue carrying all his standard varieties of trees, oranges and lemons, and I used to buy oranges and lemons every two or three years.

I have never seen any of Armstrong's catalogues. In the last ten or twelve years I have bought two or three orange trees from him. I don't believe I bought them from a catalogue. I applied [51] to Silva Berthold, a nurseryman in my own district, for a certain variety of oranges. They were out

(Testimony of A. B. Humphrey.)

of that variety and said, "You might get them by writing to the Armstrong Nursery at Pomona." That is the only occasion that I recall having anything to do with any Southern California Nursery.

Q. Do you take any of the State publications coming out of the State Printing Office, showing the names and varieties of grapes, and the kinds of grapes that are grown in California? Do you get them? A. No.

Q. Have you ever had an opportunity to examine or inspect any of them? A. No.

Q. I presume, of course, you comply with the law in making your shipments here?

A. Yes; that is all under the County Horticultural Commissioner.

Q. I will ask you if you have ever seen this work at all? (Handing document to witness.)

A. I have only seen this in the last 18 months.

Q. Yes. And you will notice that the name "Lady Finger" appears there under the table varieties of grapes?

A. Yes. And I protested to Mr. Hecke putting that name in there, told him he didn't have any right to do that, and he said, "I didn't know you had a trade-mark. We will take it out." He said that.

Q. You didn't protest to anybody else—

A. Didn't protest until I saw it. I didn't know it was in there at all.

The WITNESS.—We ship our grapes in cars, in lugs, and brace them. Five or six years ago they

(Testimony of A. B. Humphrey.)

were all crates. We have gradually changed until we ship almost all lugs. It is a modification of the Los Angeles lug. They have covers on them. Since I got the trade-mark, I place the label on the top side of the cover. Before that I stamped them on the end of the box "Lady Finger" with [52] a rubber stamp. I do the same thing with other varieties that I produce—Tokay, Cornichon, Emperor, and Malagas. I started doing that long before there was any Fruit and Vegetable Standardization Act; have done it for 38 years.

Q. You don't label the box "Rish Baba," do you? A. Never.

Q. Why not?

A. Well, I don't know the Rish Baba. I don't know that variety—I didn't know it at all until I investigated the matter after this controversy occurred. "Rish Baba" didn't mean anything at all to me.

Q. Well, you didn't put them in as unclassified, did you?

A. I didn't put them in as unclassified. When I started in this business there was no question as to classification.

Q. You didn't ever raise any Pizzutello di Roma grapes, did you?

A. Never, I know the variety, though.

Q. Did you know that the ordinary name of them, the common name, trade name, in this State of that variety of grapes was "Lady Finger" before you ever started raising Rish Baba grapes?

(Testimony of A. B. Humphrey.)

A. It never was.

Q. You are certain about that, are you?

A. I am certain.

Q. And you disagree somewhat with Professor Frederick T. Bioletti of the State University in that respect?

A. No, I don't disagree with Professor Bioletti.

Q. Did you ever discuss with him the question as to whether or not you had taken a common name for the use of applying it to grapes, when you took the name of "Lady Finger"?

A. I have told him that I was raising "Lady Finger" grapes and he has told me that as far as he can determine it is the Rish Baba grape, that they call it "Rish Baba." He said he wanted to come down to my place and find out,—make an investigation, and I told him I would be very glad to have him come down, to come down any time he wanted to. [53]

Q. Didn't he tell you you were applying the wrong name and that "Pizzutello di Roma" was the correct name?

A. He didn't, no, sir. Pizzutello di Roma?

Q. Yes.

A. My district was practically the only district in which it was raised, as far as I know. There were a few raised in the Santa Cruz Mountains; but it was originally brought into Fresno as the White Cornichon until I grew "Lady Fingers" and then they changed it to "Lady Fingers."

(Testimony of A. B. Humphrey.)

Q. Didn't you ever talk to Professor Bioletti of the University? A. Many times.

Q. And you told him you had originated the "Lady Finger" grape? A. Yes, sir.

Q. And he told you that name was put on that grape before you ever told him that, didn't he?

A. He didn't tell me that. He said, "As far as I know, Mr. Humphrey, this variety is known as the 'Rish Baba'; I have made up my mind by study and investigation that it must be the Rish Baba. I would like to have the privilege of coming down to your place and see if it is the same." I said, "Come any time you want to"; but he came at a time, unfortunately, when I was not there, and he told me afterwards, "I am fully satisfied your variety and the Rish Baba are identical."

Q. Didn't he tell you then on the score of priority in California the name "Lady Finger" applied to the Pizzutello di Roma, but on the score of first successful production it applied to the Rish Baba variety? Isn't that what he told you?

A. He may have said that, too.

Q. That is true, isn't it?

A. I don't think it is in any sense of the word. There were no Rish Baba grapes in the market as far as I have been able to find out. I seem to have been the only one that got hold of that variety and produced the first bunch. In [54] all my inquiries I have never found anybody who grew that grape before I did, and growers agree with me.

Q. Now, we don't want a speech on this. You

(Testimony of A. B. Humphrey.)

answer the question. Now, I believe you said that nearly everybody has ceased using the name "Lady Fingers" in the state,—shippers of grapes?

A. Where I have notified them, they have.

Q. Who have you notified?

A. The Earl Fruit Company and the California Fruit Exchange, who shipped about 12,000 cars, I think, a year. They have notified their representatives and have notified their growers to market the grapes under a name other than "Lady Fingers."

Q. How did you know that?

A. Because I have noticed that the growers are putting another name on the boxes.

Q. Very well. What name is the grower putting on where he used to put the name "Lady Finger"?

A. In the cases that I have run across—

Q. Well, who have you run across?

A. I have run across neighbors at mills, Earl Fruit Company growers.

Q. In what counties do they reside?

A. Sacramento County.

Q. You never knew anybody in the San Joaquin Valley who changed the name since you made your protest?

A. I have been investigating the matter and I find that the order went out as a general order.

Q. From whom?

A. From the head offices of the Earl Fruit Company and the California Fruit Exchange and I can't recall right now—

Q. Well, the orders were given to whom?

(Testimony of A. B. Humphrey.)

A. We wrote the Earl Fruit Company protesting against the use of the name "Lady Fingers" and after one or two exchanges of letters they issued the order. [55]

Q. Just a moment, now. They issued the order, you say? A. Yes.

Q. In what form did they issue it?

A. They sent out a circular telling their growers confidentially—this is only judgment on my part because of the results—

Q. Well, you don't know anything about it, whether they issued an order or not, do you?

A. Except that the growers quit using the name "Lady Fingers."

Q. What growers quit?

A. Specifically, I can't say. A man by the name of Humphrey, for one, who happens to be a neighbor of mine, but not a relative of mine, however; a man by the name of Winkelman, who shipped with the Earl Fruit Company.

Q. You know the reason they quit, don't you? Wasn't it on account of representatives you have been sending around threatening them if they used that name "Lady Fingers" that you would prosecute them?

A. I am too mild a man to do that. I never did that.

Q. You didn't do that? A. No.

Q. Only last year didn't you threaten Mr. Fernand de Journal and Robert de Journal, who live

(Testimony of A. B. Humphrey.)

in Fresno, that if they did not discontinue using this name you would bring suit against them?

A. My attorneys wrote them, perhaps.

Q. Then you don't stand responsible for their acts?

A. Well, I have confidence in my attorneys, yes.

Q. Did you ever instruct your attorneys to threaten them with a lawsuit if they didn't discontinue using the name "Lady Fingers"?

A. I merely brought it to their notice. Here is an infringement. What is to be done? They wrote the letters.

Q. Now, I want to know something about that 25 cents per package concession which you say you made last year up in Portland, Mr. Humphrey. Is that where that concession was made?

A. Portland, yes. [56]

Q. Whose grapes were they? A. Mine.

Q. That had been sold?

A. They were on the road to sell.

Q. How do you know that?

A. My agent notified me that the agent of the party who was using that name had told them.

Mr. CONLEY.—Now, if your Honor please, we move to strike out the testimony on the ground that it is manifestly hearsay. He stated it as a positive fact in his direct examination that the fact existed. Now, he says he has been told by somebody else that told them that told someone else who told him.

The COURT.—Motion denied.

(Testimony of A. B. Humphrey.)

Mr. CONLEY.—Q. Now, to whom did you make this 25-cent concession,—your agent?

A. Directly to my agent.

Q. And the reason was what?

A. He came to me and said, “We are beat before we start.” I said “Why?” and then he said, “Well, we agreed to pay you a certain price. This man Arkelian has a car of grapes on the road which will arrive here about the same day as our first car arrives, or perhaps a day prior to the arrival of our first car, which the agent is pricing on arrival, and we are informed it will be 25 cents less than we have agreed to pay you.”

Q. Twenty-five cents less per what?

A. Per package.

Q. That would be how many pounds,—how many dollars per car? A. \$250 a car.

Q. That would be 25 cents less per package, would be a cent a pound, wouldn't it?

I. It would be 25 cents a package. There are a thousand packages in a car. I sell them by the package—26 pounds in a package.

Q. You don't know whether your agent told you the truth or not, do you?

A. I know he told me the truth because he came to me personally and made the deal with me to come back and tell me the facts and I made a concession to him accordingly. [57]

Q. Do you know whether Mr. Arkelian ever sold any grapes for as low a price as you sold your grapes to your agent?

(Testimony of A. B. Humphrey.)

A. I don't know, because I didn't go up there.

Q. You don't know anything about it?

A. I didn't go up there; I don't know.

Mr. CONLEY.—That is all.

Redirect Examination.

Mr. LOFTUS.—Q. At the time that you first gave this grape the name "Lady Fingers" did you have occasion to apply any name to any other variety of grape?

A. Oh, yes.

Q. What other variety?

A. In that lot there were ten varieties. They were all numbered from 1 to 10. They were all grafted in a row by themselves; and numbers 4 and 8 proved to be alike, although they came with different names on them, unpronounceable names that nobody can remember without carrying a memorandum around with them; and the numbers 1 and 2 proved to be a fine quality of grape,—only one was very small, a very small white grape, and another one was a little bit larger, a round, white grape. I named those. They didn't produce that year. They didn't produce until the following year, and I named those "Baby toes." They were a totally different grape from the Lady Finger, and they were a grape—that is—the berry itself was just about the size of a baby's big toe, and I just called this one "Baby Toes" and have ever since been raising them and calling them "Baby Toes."

(Testimony of A. B. Humphrey.)

Q. You are still growing a brand of grapes known as "Baby Toes"? A. Yes.

Mr. LOFTUS.—I think that is all. [58]

Recross-examination.

The larger variety I called "Baby Toes, Number 2," and immediately after that I got a supply of the wood and grafted it into old vines and it proved that it was a very shy bearer. We then discarded Number 2 and I gave the name to Number 1, which was a similar berry; and it proved to be a good bearer. I kept it and called that "Baby Toes."

The COURT.—Q. You had them numbered 1 to 10, and one you called "Baby Toes." What did you call the rest?

A. I never pursued the propagation of the rest, except the "Lady Fingers" and the "Baby Toes." They proved to be indifferent varieties, not worth anything as commercial varieties. They were red varieties and black varieties. I have them yet; but I don't ship any of them commercially.

Mr. CONLEY.—Q. Do you ship any under the name "Baby Toes"?

A. Yes.

Q. For how many years have you done that?

A. Ever since I have been producing them.

Q. They are not listed in the Standardization Act, are they?

A. I don't think so. Nobody raises them.

Q. What is the real name of that variety?

A. I can't say.

(Testimony of A. B. Humphrey.)

Q. Did you find any other names for the other ten as his Honor asked you a moment ago?

A. No.

Q. You ran out of names as soon as you got through with those two varieties,—“Lady Fingers” and “Baby Toes”; is that it?

A. I didn’t propagate the other varieties. I would have if they had had merit. They didn’t have any merit, so I never considered naming them. There was no incentive.

Q. Those are the only two varieties you have ever named,—“Lady Fingers” and “Baby Toes”?

A. That is all. That is all I got [59] out of that lot. I had 60 varieties gathered up from different parts of the United States and Europe and those are the only two I considered of any commercial value.

Q. Why don’t you try to market more “Baby Toes”?

A. They haven’t got the outstanding appearances of the grape, such as the one I discovered that is named “Lady Fingers.” There are other grapes that are almost the same and just as good, and I never had any reason to believe that they had merits sufficient to justify propagating them like I do “Lady Fingers.”

Mr. CONLEY.—That is all.

Redirect Examination.

Mr. LOFTUS.—You mentioned the fact that you used a rubber stamp with which to affix that name “Lady Finger” to the boxes and packages prior

(Testimony of A. B. Humphrey.)

to your adoption of this more elaborate label. Do you recall getting such a rubber stamp from a rubber-stamp manufacturer in Sacramento?

A. Yes. Immediately after I began to get a supply of these grapes I got a rubber stamp made for them the same as I had prepared for all the other varieties. If they were mixed up in the car with Tokays, Cornichons, and other varieties, I had to designate them; so I had a rubber stamp made for each variety.

Q. When was that?

A. I would say in the early part of 1900, although I failed to find a record prior to 1905. But in 1901, '02, '03 and '04, we were shipping them in quantities sufficient to have a stamp. The first ones we got, I remember writing the name,—only having 2, 3, 4, 5 or 20 crates the first year or two and I wrote the name on or printed it on with a pencil. Then we got a stamp. And in 1905 we have a record of getting a stamp, and ever since then I have been keeping a supply of those stamps on hand, Mr. Loftus. [60]

Mr. LOFTUS.—I want to offer in evidence a photostatic copy of one page from the ledger of the rubber-stamp manufacturer, showing an item dated "August 8, 1904," reading: "Lady Fingers #1 Pad for A. B. Humphrey," and so forth, and counsel has agreed to stipulate that that may go in without calling the man who kept the ledger.

(The photostatic copy of the Ledger Sheet re-

(Testimony of George Winkelman.)

ferred to was received in evidence and marked Plaintiff's Exhibit 5.)

Mr. LOFTUS.—That is all.

(Witness excused.)

TESTIMONY OF GEORGE WINKELMAN, FOR PLAINTIFF.

GEORGE WINKELMAN, called as a witness on behalf of plaintiff, after being first duly sworn, testified as follows:

The COURT.—Is this a neighbor?

Mr. LOFTUS.—Yes.

The COURT.—I suppose he will testify he got cuttings of these grapes from Mr. Humphrey?

Mr. LOFTUS.—Yes.

The COURT.—And has grown them?

Mr. LOFTUS.—And that he markets his grapes as "Rish Baba" grapes and he sells them to others through the plaintiff, A. B. Humphrey.

The COURT.—I suppose you will stipulate that he will testify to that?

Mr. CONLEY.—I didn't get that, your Honor.

The COURT.—That he will testify he is a neighbor of Mr. Humphrey, and I suppose he is the man that has been given cuttings of these so-called "Lady Finger" grapes and counsel now adds to what I stated, that he markets his grapes as "Rish Baba" grapes and that he sells those grapes through the plaintiff. [61]

Mr. CONLEY.—If counsel so states, I will stipulate he will so testify.

(Testimony of George Winkelman.)

Mr. LOFTUS.—And Mr. Winkelman was present at the time this grape was first produced and was present there and saw the grape.

The COURT.—And I suppose he will say he was there and that Mr. Humphrey said “This is the ‘Lady Finger’ grape.”

Mr. LOFTUS.—And, further, Mr. Winkelman has been in the viticulture business for many years and has never heard that name being applied to any other grape at any time.

Mr. CONLEY.—We will stipulate to that, that he would so testify. But I would like to ask Mr. Winkelman a few questions.

Cross-examination.

As near as I can recall, I first observed these “Lady Finger” grapes out at Mr. Humphrey’s place, the second year after it was grafted. It was grafted in the spring of ’94 and I saw the bunch of grapes in ’95. There were eight or ten,—ten varieties of vines. On this particular vine there were produced one or two bunches of grapes. Some of the other vines and varieties didn’t have any grapes. All told, I saw more than a half dozen bunches of grapes. The vines just had numbers on them, and when these grapes first came we were all interested, looking for the quality and so forth, and this particular one was different from any others we had even seen; and he stated it had merit. And my recollection is and I have always understood that Mr. Humphrey called it “Lady Fingers” on account of the shape of the berry.

(Testimony of George Winkelman.)

Q. He didn't say anything about "Lady Fingers" at the time when you were looking at the grapes, did he?

A. That is too far back.

Q. You don't remember hearing him say the word "Lady Fingers" [62] at that particular time? A. Not at that particular moment.

Q. You don't remember how you first heard the term "Lady Finger," do you?

A. I remember distinctly that the term "Lady Finger" applied to the shape of the berry. That is my recollection.

Q. That was a long time afterwards, though?

A. No.

Q. How long afterwards?

A. It may have been right there. It may have been that next year.

Q. It may have been the next year, you say?

A. Yes.

Q. You have been talking with Mr. Humphrey since this trial commenced, have you not?

A. No.

Q. You never said a word to him about it?

A. About this trial?

Q. Yes.

A. There has never been a word said about the trial; only that the trial would come up.

Q. And he didn't talk to you about what your evidence would be here at all? A. My God, no.

Q. No. That is all. I have just one or two more questions. Did you ever ship any of these

(Testimony of George Winkelman.)

grapes under the name of "Lady Fingers," the grapes you raise yourself?

A. Yes. I have shipped some. I have shipped them for a number of years.

Redirect Examination.

The shipments I make of "Lady Finger" grapes is now done under license of Mr. Humphrey. Mr. Humphrey gave me a stamp last year to mark the boxes with. I think it says, "Packed under supervision of A. B. Humphrey Company." They are shipped in Mr. Humphrey's cars. When I make shipments through the Earl Fruit Company, I stamp the boxes "Rish Baba." As near as I remember, Mr. Humphrey made his first shipments about 1898 or '99. I worked for Mr. Humphrey for 31 years. [63]

The COURT.—Q. After you testified that you were shipping "Lady Finger" grapes you said, "It is now." What did you mean when you said, "It is now"? You gave me the impression that you had in the beginning shipped grapes as "Lady Finger" grapes.

A. No. We never shipped any as "Lady Finger" grapes except through Mr. Humphrey. Personally I have never shipped any "Lady Finger" grapes at all until, oh, it might have been, I guess, about 5 years ago.

Q. And did you then ship them as "Lady Finger" grapes? A. Yes.

(Testimony of George Winkelman.)

Q. And then after that Mr. Humphrey gave you the stamp? A. He did.

The COURT.—That is all.

(Witness excused.)

TESTIMONY OF JERRY BUCKLEY, FOR PLAINTIFF.

JERRY BUCKLEY, called as a witness on behalf of plaintiff, after being first duly sworn, testified as follows:

My postoffice address is Mills, California. I am 62 years of age. I am in the horticultural business, and have been since 1885. I am acquainted with Mr. A. B. Humphrey; have known him since 1892. I was his foreman for a number of years on the ranch at Mayhews. My knowledge of Mr. Humphrey's production of grapes under the name "Lady Finger" was had by reason of the fact that I grafted a number of cuttings on to some young Tokay vines which were one or two years old at that time. I did that work—I am pretty sure I did some of it in '94 and some in '95. It is my recollection that Mr. Humphrey got two separate lots of cuttings. There was less than a dozen in one lot, and two or three dozen in another; and I grafted them all on the same young Tokay vines, which were planted in '93. The vines were numbered as I got them, and I [64] put the numbers on the stakes as I grafted the vines. All kinds of grapes grew out of that—some good, bad, and indifferent.

I don't know how the one came to be called "Lady

(Testimony of Jerry Buckley.)

Finger” but I can tell when I first heard that name. In 1896 I moved from Mr. Humphrey’s ranch to Butte County. In ’98 Mr. Humphrey and his children were visiting me there. I asked one of his little girls about this new variety of grapes, and they told me they had named two of them, “Lady Fingers” and “Baby Toes.” I remember that because I thought at the time they were poor names to give to grapes. Thereafter I have seen “Lady Finger” grapes being grown and shipped [65] by Mr. Humphrey, but not in very close touch. I am living now within three or four miles of Mr. Humphrey’s ranch and have been for 25 years. Prior to 1898 I never had heard of the name “Lady Finger” applied to grapes at all, and I had been in the horticultural business since 1885.

Mr. LOFTUS.—That is all.

Cross-examination.

I am not familiar with the San Joaquin Valley, and I never was down there to investigate whether or not grapes of that variety were grown there.

Mr. CONLEY.—That is all.

Mr. LOFTUS.—Nothing further.

PROFESSOR BIOLETTI.

Mr. LOFTUS.—I expect a witness here at two o’clock, your Honor. I didn’t want to detain him any longer than necessary and told him to come at 2 o’clock. It is Professor Bioletti, and he is very busy; he is a Professor at the University over in

Berkeley and has classes over there, and I didn't think we would need him until two o'clock.

The COURT.—What do you want to prove by him?

Mr. LOFTUS.—I want to bring out from him that the scientific name for this grape is "Rish Baba" and is so known throughout the industry.

The COURT.—I suppose you will admit that?

Mr. CONLEY.—No. We can't stipulate that to be the fact. We will stipulate that Professor Bioletti would so testify, if called as a witness, that the name formerly applied to it was "Rish Baba." Is that it, Mr. Loftus?

Mr. LOFTUS.—Yes; that Professor Bioletti would testify [66] that the scientific name of this grape which Mr. Humphrey has named "Lady Finger" is "Rish Baba"; and that the grape is so known throughout the industry as the "Rish Baba" grape.

Mr. CONLEY.—Yes.

The COURT.—A Persian grape?

Mr. LOFTUS.—Yes.

Mr. CONLEY.—We will stipulate that he will so testify. "Rish Baba," which means "Papa's Beard."

Mr. LOFTUS.—And I wanted Professor Bioletti to identify the article which he has written for this publication, entitled "California's Most Important Table Grape Varieties," with which counsel is undoubtedly familiar.

Mr. CONLEY.—I don't see the dates.

Mr. LOFTUS.—It is dated May 1, 1925.

The COURT.—What is the purpose of that?

Mr. LOFTUS.—It is a discussion by the scientist of this variety of grape, in which he states that the true name is “Rish Baba” and explains how it happened to be so named, and goes on and states that the “Lady Finger” is the trade name of the Humphrey variety.

The COURT.—Well, that is a mere statement of his opinion upon the matter. What weight has that?

Mr. LOFTUS.—If I had him on the witness-stand I wanted to repeat what was in this article here.

Mr. CONLEY.—Well, that—

The COURT.—He may have investigated the question and that may be his opinion as to how that grape came to be called “Lady Finger.”

Mr. LOFTUS.—Well, this was written after a great deal of investigation. [67]

The COURT.—Well, I suppose you will have to have him here. I don’t suppose you will want to admit that in evidence, Judge Conley?

Mr. CONLEY.—If he is to be here I would like to ask him two or three questions.

Mr. LOFTUS.—He will be here at two o’clock. As I say, he is a very busy man, attending to classes over at the University and—

The COURT.—What do you want to prove by him? That this was originally a Persian grape and that the true name of it is “Rish Baba”?

Mr. LOFTUS.—He discusses the whole history of the grape in this short article.

The COURT.—We don't care particularly for that, do we?

Mr. LOFTUS.—Yes. I think it is material, your Honor.

The COURT.—I don't see how it is.

Mr. LOFTUS.—If the other side is willing to admit this grape was originally imported into this country from Persia and that the original name of it was "Rish Baba"—

The COURT.—And now it is claimed that it has a trade name, "Lady Finger," and you claim your client discovered that name and has a monopoly on it?

Mr. LOFTUS.—That he was the first to adopt and use it.

The COURT.—I don't think the professor can throw any light on that. Your client says he is the first man that applied that name to the grape and selling the grape under that name to the trade.

Mr. LOFTUS.—If those things are stipulated to I don't think it will be necessary to call Professor Bioletti.

The COURT.—You can't stipulate to that. How can you stipulate to that? [68]

Mr. LOFTUS.—I am referring as to the origin of the grape; that "Rish Baba" is the correct scientific name of Mr. Humphrey's "Lady Finger" and that the grape originally came from Persia.

The COURT.—Will you stipulate that this grape originally came from Persia?

Mr. CONLEY.—Yes.

The COURT.—And that the grape was originally known as “Rish Baba”?

Mr. LOFTUS.—And that it is so known in this country?

Mr. CONLEY.—That is just the fact; it is not so known in this country.

Mr. LOFTUS.—Professor Bioletti can testify to that.

Mr. CONLEY.—I will guarantee you that there isn't one in a hundred professors that can testify he ever saw a Rish Baba grape in this state. I am 62 years old and was born right here in this state and I never have seen a Rish Baba grape, or a grape known as “Rish Baba” here, and I have got a lot of witnesses here who have been in the grape business all their lives who never heard the name “Rish Baba.”

The COURT.—I am not going to take up a lot of time on witnesses of that kind.

Mr. LOFTUS.—We would like to have him identify this pamphlet or this article which he wrote here.

Mr. CONLEY.—I am willing to stipulate with you, Mr. Loftus, that the professor will swear to what he said in there. I won't, however, stipulate that as being the fact.

The COURT.—I would not expect you to do that. All right. Do you want to offer that?

Mr. LOFTUS.—All right. I will offer the pamphlet in evidence, particularly with respect to the pamphlet entitled: [69] “California’s Most Important Table Grape Varieties,” published by the California Grape Growers, San Francisco, California, dated, San Francisco, May 1, 1925. I offer it in respect to the article entitled: “Persian Grapes,” by Frederick T. Bioletti, University of California, appearing on pages 15 and 16.

(The pamphlet was received in evidence and marked Plaintiff’s Exhibit 6.)

Plaintiff rests.

Thereupon court adjourned until two o’clock P. M.

AFTERNOON SESSION—MAY 23, 1928, 2 P. M.

Mr. CONLEY.—If your Honor please, perhaps to save time, it is stipulated that Webster’s New International Dictionary of the English Language, published by G. & C. Merriam Co., Springfield, Massachusetts, defines Lady Finger,—See Lady’s Finger,—as a variety of grape. Your witness testified to that this morning.

Mr. LOFTUS.—I didn’t understand that he testified to the date. I have no evidence as to the date of the publication.

The COURT.—I understood Mr. Humphrey, your client, to state that it was in 1920 or 1921,—something like that. Isn’t that right? That edition of Webster’s Dictionary that you saw was 1920 or ’21?

Mr. HUMPHREY.—I looked it up last year in

the Mechanic's Library. I looked up all the dictionaries, and I found one dictionary which was dated as being edited in 1921. I think it might have been 1920; but I could not find it only in one edition. None of the older editions could I find it in. [70]

Mr. LOFTUS.—I will stipulate to the extent of Mr. Humphrey's statement.

The COURT.—Of course, what he testified to you will stipulate. If you have the dictionary, and I think we have it in our library, probably—if we have it won't be necessary to stipulate to that. I can refer to it.

Mr. CONLEY.—I simply wanted to avoid taking the time and trouble of digging one up.

The COURT.—Well, if you will state the edition and the authority I will dig it up.

Mr. CONLEY.—Very well.

The COURT.—Is that what the dictionary says, as you just stated?

Mr. CONLEY.—Yes. It defines "Lady's Finger" as a variety of grape. And we also have the Armstrong Nurseries catalogues for 1921 and 1922. We offer these in evidence for the purpose of showing that grapes were listed at that time as "Lady Finger."

The COURT.—1920 and '21?

Mr. CONLEY.—1921 and 1922, your Honor.

Mr. LOFTUS.—They bear those dates?

Mr. CONLEY.—Yes. (Showing catalogues to Mr. Loftus.)

We offer in evidence page 19,—it is the same page in each of these catalogues of the Armstrong Nurseries, which defines “Lady Finger” grapes under the caption “Select Vine and Bush Fruits” and in the middle of the page scored in red indicating “Lady Finger” grapes: Bunches larger; berries long, white; flesh tender, crisp and sweet.”

Mr. LOFTUS.—I make the objection to all these offers that they are incompetent, irrelevant and immaterial, being many years [71] subsequent to the adoption and use of the trade-mark in question by the plaintiff.

The COURT.—Overruled.

(The two catalogues were received in evidence and marked, respectively, Defendants’ Exhibits “A” and “B.”)

Mr. CONLEY.—I overlooked to state that in the Armstrong Nurseries Catalogue of 1921, on page 19, the same statement appears. Also in “California Horticulture,” by George C. Roeding, copyrighted in 1909. We offer that in evidence for the purpose of showing a variety of grape known as “Lady Finger,” on page 42.

Mr. LOFTUS.—I object to that, your Honor, as there is no evidence here as to the date of the publication of that pamphlet. It is a private pamphlet, and its date of publication is in nowise proved. It merely states “Copyrighted,”—that a copyright was taken out in 1909. That may be a subsequent edition.

The COURT.—Do you want to bring someone here from Roeding's plant to testify to the date of the publication of that pamphlet?

Mr. CONLEY.—We tried to get Mr. Roeding this morning and we were unable to get him.

The COURT.—Well, if you are going to question the date of the publication, I will give the judge an opportunity to bring someone here to prove it.

Mr. CONLEY.—I will offer the pamphlet in evidence for whatever it is worth. It is only introduced to show the name was published and had been circularized all over the state as early as 1909.

Mr. LOFTUS.—The copy doesn't show when it was published. It has a copyrighted date. That may pertain to an earlier edition that did not contain any of this information. [72]

The COURT.—That may be true. You don't know when that was published?

Mr. CONLEY.—It doesn't state on here, your Honor.

The COURT.—Perhaps you can find that out. Who printed it? (The pamphlet was handed to the Court.) It appears here: "California Horticulture, by George C. Roeding." That appears on the outside of the page. It does not show the date, except "Copyrighted, 1909, by George C. Roeding. All rights reserved." I suppose it was published before that.

Mr. LOFTUS.—It is a different edition, no doubt. These things are revised each year.

Mr. CONLEY.—If it becomes important I will see if I can't get Mr. Roeding here.

We also offer in evidence—

The COURT.—You had better mark that. (The book entitled “California Horticulture” was marked Defendants' Exhibit “C.”)

Mr. CONLEY.—We also offer in evidence the California Standardization Act of 1927, with particular reference to page 14, where there is a variety of grapes listed and scheduled as “Lady Finger.”

Mr. LOFTUS.—The date of that is 1927.

Mr. CONLEY.—The date of that is 1927.

Mr. LOFTUS.—The same objection to that.

The COURT.—Overruled.

(The copy of the California Fruit, Nut and Vegetable Standardization Act of 1927 was received in evidence and marked Defendants' Exhibit “D.”)

Mr. CONLEY.—We also offer in evidence this mimeographed copy of the California Fruit, Nut and Vegetable Standardization Act of 1927, provisions of Section 22, arranged by California Department of Agriculture, G. H. Hecke, Director, Bureau of Fruit and Vegetable [73] Standardization, W. F. Allewelt, Chief, on page 1, and on page 2 under classification of varieties we find the name “Lady Finger.”

(The document referred to was received in evidence and marked Defendants' Exhibit “E.”)

TESTIMONY OF W. FLANDERS SETCHEL,
FOR DEFENDANTS.

W. FLANDERS SETCHEL, a witness called on behalf of defendants, after being duly sworn, testified as follows:

I reside in Redwood City, and my place of business is the Russ Building, San Francisco. I was engaged in the grape-growing industry in this state for 14 years. During that time I also sold grapes. I have seen this work on California Horticulture before. I purchased this identical copy the early part of 1911 in Fresno, at the offices of the Roeding Nurseries. It has been in my possession ever since, until Mr. Conley took it from me a few weeks ago.

Mr. CONLEY.—We offer it in evidence as of a date at least as early as 1911.

Q. Did you ever own any vineyard property in Fresno County? A. Yes.

Q. And what ranch was it known as?

A. I owned altogether at one time 1300 acres of vineyard in Fresno County. Do you wish me to state that I owned the Carmelita Vineyard?

Q. I will ask you to state anything you want in that connection.

A. Yes, I at one time owned the Carmelita Vineyard in Fresno County.

Q. And I will ask you if you grew any "Lady Finger" grapes on that vineyard? A. Yes.

Mr. LOFTUS.—This form of questioning is ob-

(Testimony of W. Flanders Setchel.)

jected to. The issue is what use, if any, was made of the trade-mark, the name, [74] "Lady Finger," prior to the adoption and use of it by the plaintiff.

The COURT.—Overruled. I suppose that is what Mr. Conley is leading up to.

Mr. CONLEY.—Q. How many acres were planted to vineyard in the Carmelita property?

A. When I purchased it, 232.

The COURT.—Q. When was that you purchased it? A. 1915.

Mr. CONLEY.—Q. How many acres were in "Lady Fingers"?

The COURT.—232 acres, he says.

The WITNESS.—No, your Honor; 232 acres in the property.

The COURT.—Q. How many acres in "Lady Fingers"?

A. I would imagine about 5 or 6 acres.

Mr. CONLEY.—Q. And were those grapes bearing at the time you purchased the vineyard?

A. Yes.

Q. They were in bearing? A. Yes, in 1915.

Q. From whom did you purchase that vineyard?

A. From Arthur W. and W. S. Goodfellow.

Q. I will ask you if you made any disposition of your crop of grapes in 1915?

A. Yes; I picked them and shipped them.

Q. And what was the name of the variety; under what name did you ship them?

A. "Lady Finger."

(Testimony of W. Flanders Setchel.)

Q. Where were they sold?

A. They were sold principally in New York and Chicago.

Q. I will ask you if you ever knew these grapes by any other name?

A. No. We always called them "Lady Finger."

Q. And do you know when Mr. Goodfellow planted the grapes?

A. He did not plant them. They were grafted two years prior to that. He grafted some Zinfandels in 1913.

Q. Do you know of any other grapes of that variety being grown in the San Joaquin Valley other than on the Carmelita Vineyard?

A. In 1916, '17 and '18 I shipped carloads of them from the Lindsay district. [75]

Q. And the Lindsay district is located in what county? A. Tulare.

Q. Do you know of any other county other than in the San Joaquin Valley or in the State where "Lady Finger" grapes are grown?

A. I have heard they are grown elsewhere in Fresno County. Of my own personal knowledge, outside of Fresno and Tulare County, I only know they are grown on Mr. Humphrey's place.

Q. Mr. Humphrey's place is in Escalon?

A. Yes.

Q. I will ask you if you had occasion to meet Mr. Humphrey at any time during the year 1918 in the City of Sacramento?

A. That is the only occasion I have ever met and

(Testimony of W. Flanders Setchel.)

talked to Mr. Humphrey was in Sacramento in 1918.

Q. And what was the occasion that you visited with him at that time?

A. I was president of the Valley Fruit Growers' Association that was handling the farm labor in California in the main and we held a meeting of farmers and labor contractors in Sacramento, among other places, and while I was there Mr. Humphrey either introduced himself to me or was introduced to me and told me he had this place at Escalon and that he had "Lady Finger" grapes. He stated in the course of our conversation that he had grown them for some while and I told him that I had also grown some and was shipping them and we commented on the qualities of the grape and he made the statement to me that remained in my mind that myself and others that were shipping the grapes ought not to be using the name "Lady Finger," and he conveyed the thought to me he had some rights to it.

Q. You informed him you were shipping these grapes right along? A. Yes.

Q. Did you continue shipping them?

A. Certainly.

Q. For how many years after this conversation?

A. For four years after that. [76]

Q. You received no notification from him or from his attorneys to cease shipping during that time, did you? A. No.

Mr. CONLEY.—Take the witness.

(Testimony of W. Flanders Setchel.)

Cross-examination.

Mr. LOFTUS.—Q. How many crates of these “Lady Finger” grapes, which you call “Lady Finger” grapes, did you ship all together,—that is, while you were in charge of the property?

A. I am going to approximate this, you understand; I would say about 14 cars. We had 14 or 15 cars, probably, in the aggregate.

Q. Over a period of 4 years?

A. Yes. You are referring exclusively to this Carmelita property?

Q. Yes. And you got all those from 5 acres?

A. Yes; it is probably understated.

Q. Have you any interest at the present time in this Carmelita property? A. None, whatever.

Q. When did you dispose of the property?

A. The end of 1921.

Q. To whom?

A. The property was purchased by the Dwight Lumber Company and California Pine Box Distributors.

Q. You don't know where the cuttings or wood came from from which these grapes were grown, do you? A. Yes, I do.

Q. Where did they come from?

A. They were obtained through George Roeding's place on Bellmont Avenue near Fresno.

Mr. LOFTUS.—That is all.

(Witness excused.)

Mr. CONLEY.—Your Honor, I would like to add another part to the exhibit, or offer it as a sepa-

(Testimony of Fernand de Journal.)

rate exhibit. I overlooked this. It is a newspaper clipping advertising "Lady Finger" grapes.

Mr. LOFTUS.—That is immaterial. That is dated January, 1928. [77]

Mr. CONLEY.—I suppose that would go to the weight of the testimony. However, I offer it as a part of the other exhibit, whatever it may be.

The COURT.—Overruled. You had better mark that as a separate exhibit.

(The paper referred to was received in evidence and marked Defendants' Exhibit "F.")

TESTIMONY OF FERNAND DE JOURNAL, FOR DEFENDANTS.

FERNAND DE JOURNAL, called on behalf of defendants, after being first duly sworn, testified as follows:

I have been an attorney for forty years. I have now retired and I look after land and vineyards. I am interested in the Carmelita Vineyards. I sold part of it to Mr. Setchel, first, and it is now the property of the Dwight Lumber Company. I look after it, however, manage it, and have done so since 1921. I am familiar with the variety of grapes that are being grown on that vineyard at the present time and that have been grown there since 1921. Included in my varieties I have grapes that are commonly known and designated as "Lady Fingers." I have about twelve acres of these grapes. I ship them under the name "Lady Fin-

(Testimony of Fernand de Journal.)

gers." So far as I am aware, they are known in Fresno County only as "Lady Fingers."

Q. And how does the trade and the people generally speak of that variety; what name do they give it?

Mr. LOFTUS—That is objected to as calling for the opinion and conclusion of the witness.

The COURT.—If you know. Overruled.

A. "Lady Fingers."

Mr. CONLEY.—I think that is all. You may take the witness. [78]

Cross-examination.

Mr. LOFTUS.—Q. You have been notified by attorneys representing the A. B. Humphrey Company that you were infringing the "Lady Finger" trade-mark, have you?

A. I do not recall the terms of the letter, Mr. Loftus. I know, however, that I received a letter from your firm to the effect that Mr. Humphrey claimed the sole right to call these grapes "Lady Finger" grapes. I received that letter, I think, in 1926 or 1927. I rather think it was 1926. I am not sure which year it was.

Q. And since you have been in charge of this Carmelita property altogether how many crates or carloads of these grapes have you shipped bearing the name "Lady Fingers"?

A. Well, that is very hard to say from memory. The first two years we shipped about five or six cars, and when we increased the acreage from about

(Testimony of Fernand de Journal.)

4 or 5 acres, that were being grafted on other grapes to 12 acres, we have been increasing the shipments of cars. The first two years there were very little, but now we get about 6 tons to the acre in the new planting and about, I should say, 8 tons to the acre in the old acreage. It is a matter of computation from those data.

The COURT.—Q. You might estimate it, Mr. de Journal. You said you had 12 acres, or had increased your acreage to 12 acres; that you had 4 or 5 acres when you took charge?

A. Yes, when I took charge. Maybe it was 6—5 or 6 cars.

Q. You say you were shipping how many carloads a year,—5 or 6?

A. No. For the first two years we shipped 5 or 6 carloads and since that time we have increased the shipments; and I would say the last year, I think we shipped 10 carloads about. They did not go by carload last year. They went by truck to Los Angeles.

Q. That is an estimate, anyhow?

A. An estimate, yes. But I should say altogether 25 carloads. [79]

Mr. LOFTUS.—Well, how far apart are those vines planted to the acre? A. Ten by twelve.

Q. Now, you have heard this grape that you refer to as the “Lady Finger” grape designated as the Olivette Blanche, have you not?

A. I heard that lately. I never heard that before.

(Testimony of Fernand de Journal.)

Q. Are you familiar with the recent catalogues put out by this Fancher Creek Nurseries?

A. No, sir. I have no reason to look up catalogues.

Q. When did you first hear the designation "Lady Finger" applied to grapes? A. In 1916.

Q. That is the first occasion?

A. Yes. I suppose I must explain that. I owned 90 acres of that vineyard and sold it to Mr. Stechel. That was in 1916, or perhaps the beginning of 1917. At that time I went all through the vineyard and that was the first time that I saw these "Lady Fingers." That was either in the fall of 1917 when they were on the vines or the fall of 1916. I cannot remember positively.

Q. Prior to that time were you familiar with Mr. Humphrey's operations?

A. No. I never heard of Mr. Humphrey until you wrote me a letter. We had to ship these grapes under that name since I handled it because the Horticultural Commissioner would not permit them being called by any other name.

Q. You could *could* them "Rish Baba," as called for in the State law?

A. I didn't know anything about "Rish Baba." I only heard that name since this trial occurred.

Q. You could satisfy the law with calling them a small white variety, could you not?

A. No, I don't think so.

Mr. LOFTUS.—That is all.

(Testimony of Fernand de Journal.)

Redirect Examination.

Mr. CONLEY.—Q. Mr. de Journal, you paid no attention to [80] his letter, did you?

A. Well, I always pay attention to a reputable firm when they write me a letter; but I could not ship the grapes any other way, Mr. Conley. I could not ship them at all. I could not call them anything else.

Q. Did you make any reply to his letter?

A. I forget now. I think I might have acknowledged the letter. That was the courteous thing to do, but I did not stop shipping these grapes because we had to dispose of them in some way and the Government authorities, the Government inspectors, would not take any other description except the description that was authorized, you see?

Mr. CONLEY.—That is all.

(Witness excused.)

TESTIMONY OF ROBERT DE JOURNAL,
FOR DEFENDANTS.

ROBERT DE JOURNAL, a witness called on behalf of defendants, after being first duly sworn, testified as follows:

I am 37 years of age; my occupation is packing and shipping fruit in Fresno County for the Carmelita Vineyard. When not so engaged I am an attorney at law, admitted in 1916, I believe. I know the variety of grapes known as the "Lady Finger" grape. I have seen those grapes grown in Fresno

(Testimony of Robert de Journal.)

County on the Carmelita Vineyard. I have also seen them on the Frank H. Wilson place; and I don't recall having seen them any other place. I will describe the variety of grape to the Court, as a long, slender, white variety, with very firm meat; brittle, sort of brittle meat to eat; crisp. That is about all. They are a somewhat long, pointed, grape. I never knew any other name for that variety of grape. In the handling of them I have always known of them as a "Lady Finger" grape. I have made shipments under that name, from Fresno County to Eastern points—Chicago, New York, and some local points. Also Los Angeles.

Mr. CONLEY.—Take the witness. [81]

Cross-examination.

Mr. LOFTUS.—Q. Have you ever known of a variety called "Olivette Blanche"?

A. Personally, I don't know the Olivette Blanche. I could not identify one if I saw one.

Q. You have heard the name?

A. I have heard the name mentioned in connection with grapes, but I wouldn't know an Olivette Blanche if it was presented to me. I couldn't say that it was an Olivette Blanche.

Q. Likewise, you have heard the name "Rish Baba"?

A. Yes, since this trial was brought up, I have heard those names mentioned.

Mr. LOFTUS.—That is all.

TESTIMONY OF K. ARKELIAN, FOR DEFENDANTS.

K. ARKELIAN, a witness called on behalf of defendants, being first duly sworn, testified as follows:

I live in Madera County and am a vineyardist; fruit shipper. I also purchase and sell grapes. I control about 5,000 acres of vineyard.

Q. Do you grow any "Lady Finger" grapes?

A. I have a few vines up home in the family garden. I have been acquainted with that variety of grape for about 45 years. I saw that variety of grape when we first came to Fresno and picked grapes on the Eisemann Vineyard. It was being grown at that time on the Eisemann Vineyard under the name of "Lady's Finger."

Q. Did you ever know that variety before you came to this country or after you came and went back? A. Yes, sir.

Q. Where is it grown?

A. Around Constantinople.

Q. And what is the name of the grape back there that is grown near Constantinople?

A. They call it in Turkish, "Hanan Parmaghy."
[82]

Q. And are you able to translate that term for us?

A. The translation of that is "Lady's Finger."

Q. When did you see that variety of grape in Turkey,—what year?

A. It was 1895. I bought some.

(Testimony of K. Arkelian.)

Q. Was it before or after the month of September?

A. I think it was in the month of August, when I was coming back.

Q. Do grapes mature in Turkey about the same time of year as they do in California?

A. About the same time.

Q. And was that the same variety of grape which you saw grown on the Eisemann Vineyard?

A. Yes, sir.

Mr. CONLEY.—Take the witness.

Cross-examination.

Mr. LOFTUS.—Q. What relation are you to the defendant, Ben H. Arkelian?

A. I am his brother.

Q. Tell us a little something more about this Eisemann Vineyard. Now, in what part of the vineyard did you see these grapes growing which you say were then called “Lady’s Finger”?

A. Well, Eisemann’s Vineyard, they have a winery and they have a residence and there is a big avenue between the winery and the buildings. It is a little nearer to the avenue, on the east side of the avenue.

Q. On the east side of the avenue?

A. Yes, as far as I remember, that is where it was located.

Q. And this was in what year? A. ’83.

Q. 1883? A. Yes, sir.

(Testimony of K. Arkelian.)

Q. And they were on the east side of the avenue; is that your testimony?

A. That is my recollection.

Q. And those grapes were then called "Lady Fingers," were they? A. Yes, sir. [83]

Q. And how old were you at that time?

A. Fifteen years old.

Q. And were those grapes shipped under that name?

A. Well, I don't know whether they shipped them or what they done with them. They were picking the grapes.

Q. In what way did you hear them called "Lady Fingers"?

A. The foreman called them "Lady Fingers." They had different kinds of grapes. They had wine grapes. They were packing different kinds of grapes and when they came to those white grapes they called them "Lady Fingers."

Q. What was the foreman's name?

A. Mr. Baber.

Q. This gentleman sitting over here in the courtroom? Stand up, Mr. Baber. Is that the gentleman?

A. I haven't seen him for a long time. He might be the one. He was the superintendent, but he had a foreman under him.

Q. Now, how long had you been in this country? You say 1883?

A. That is the first year we came to this country.

Q. And did you speak English at that time?

(Testimony of K. Arkelian.)

A. A little.

Q. Did you understand English?

A. I understood a little.

Q. Where were you born?

A. I was born in Turkey.

Q. What part of Turkey? A. In Marsoven.

Q. Now, when did you return to Turkey after your first visit to this country?

A. I went back to the old country in '92.

Q. In '92? A. Yes, sir.

Q. You have heard these grapes called Rish Baba, haven't you?

A. No. They were talking about that yesterday.

Q. And also Olivette Blanche,—you have heard them called that, haven't you?

A. They were speaking about that yesterday.

Mr. LOFTUS.—I think that is all.

(Witness excused.) [84]

TESTIMONY OF MARK COSULICH, FOR DEFENDANTS.

MARK COSULICH, called as a witness on behalf of defendants, being first duly sworn, testified as follows:

I was born in Dalmatia, Jugo-Slovakia. I have lived in the United States about 36½ years, and am a citizen thereof. I have resided in Fresno County, and am familiar with a variety of grapes grown there during that time known as "Lady Finger" grapes. I first saw them in 1917 or '18 in Fresno County. I can't say exactly where, but I

(Testimony of Mark Cosulich.)

have seen them down there. I never knew them by any other name than "Lady Finger" grapes. I have seen that variety of grapes where I was born. They had a Slavonic-Italian name as well, for them, which in translation means "Lady Fingers." I first remember seeing this particular variety of grapes when I was either 9 or 10 years of age. The first visit I made to the City of Spalato, a city of about 75,000 population, and the largest in Dalmatia. I went there for the late holiday season at Christmas-time and I went to a market there and I saw these peculiar grapes. I thought I had never seen any like that before, and I remember my father telling me they were originally grown in Persia or Northern Africa, and called them the name "Lady Fingers." I have not dealt in any "Lady Finger" grapes since coming to the United States. I am a grape shipper. I have also grown some, but I specialize in juice grapes. I never shipped any of these grapes.

Mr. CONLEY.—Take the witness.

Cross-examination.

Mr. LOFTUS.—Q. When did you first come to Fresno?

A. On Thanksgiving Eve in 1897 I went there the first time.

Q. Did you visit this Eiseman vineyard at any time thereafter?

A. Yes. I went out to the Eiseman vineyard on several Sundays with the family that I lived with.

(Testimony of Mark Cosulich.)

In 1897 and '98 there was a family by the name of Aguirre that I lived with and on several [85] occasions on Sundays I went out with that family to the Eiseman vineyard.

Q. And at that time did you ever hear of or see any of these grapes marked "Lady Fingers"?

A. I did not see any mark on them at that time but I was told they were "Lady Fingers." I have seen the grapes right in the place.

Q. You mean that you saw an elongated grape being grown there; is that what you mean by that?

A. Yes, sir.

Q. And, recently, you have been told it was a "Lady Finger" variety; is that correct?

A. I knew it at that time because I seen them as a boy and then I made a study of grapes 20 years ago, taking a year's course in viticulture.

Q. Where did you make this study?

A. In the city of Spalato,—Dalmatia.

Q. What was this foreign word that you called the grapes when you were a boy 9 or 10 years old?

A. "Gospodje Perst," which means "Lady's Fingers."

Q. Have you been back to that country since you left there as a child 9 or 10 years old?

A. Yes, sir. I left here in April, 1907, and I returned in July, 1908. I was there over a year.

Q. But the first time you heard the name "Lady Fingers" in this country was in 1917 or '18, was it?

A. No. I heard that when I lived in Fresno in

(Testimony of Mark Cosulich.)

1897 and 1898, before I was ever engaged in the grape shipping business.

Q. Didn't you testify on direct examination that the first time you had ever heard this name applied to the grape in this country was in 1917 or '18?

A. No, I did not. I don't think I did. You see, I seen them there on the Eiseman Vineyard when I was there on Sundays with this family. But before I was ever in the grape shipping or grape growing business,—any business at all,—I saw [86] them several times in 1917 and 1918 and several times after that.

Q. Are you related to the defendant Ben H. Arkelian? A. Not at all.

Mr. LOFTUS.—That is all.

Redirect Examination.

Mr. CONLEY.—Q. How old are you?

A. Fifty years last March.

Q. You say you have made a study of the different varieties of grapes? A. More or less.

Mr. CONLEY.—That is all.

The COURT.—Q. Did you eat any of these grapes in the old country?

A. Yes.

Q. And you ate them on the Eiseman ranch, did you? A. Yes.

Q. And could you be mistaken as to the flavor or anything of that kind?

A. No. They are the same variety of grape.

Q. The same variety? A. Yes.

(Testimony of Joseph Arkell.)

Q. You are positive of that?

A. Yes, sir.

(Witness excused.)

TESTIMONY OF JOSEPH ARKELL, FOR DEFENDANTS.

JOSEPH ARKELL, a witness called on behalf of the defendants, after being first duly sworn, testified as follows:

I am a brother of Ben H. Arkelian, the defendant in this action. I have lived in Fresno and now reside in Oakland. I have lived in Oakland 10 years or more. Prior to that, for 5 or 6 years I lived in Turlock, Stanislaus County. When I first came to Fresno, I was 9½ or 10 years of age. I know the variety of grape commonly known and designated as "Lady Fingers." Between 35 and 38 years ago I purchased these grapes on the Margarita Vineyard, when I was a mere boy peddling grapes. I was a grape peddler around Fresno. I sold the grapes as "Lady Fingers." I have been on the Eiseman Vineyard. I haven't any recollection that there were "Lady Finger" [87] grapes being grown there; but I know they were grown on the Margarita Vineyard. I did not purchase and resell many "Lady Finger" grapes. I guess 3 or 4 boxes of that variety. I have eaten these grapes, but not lately. It was probably a couple of years ago.

Q. And were they the same variety that you had consumed some 35 or 36 years previous to that?

(Testimony of Joseph Arkell.)

A. Yes, sir.

Mr. CONLEY.—Take the witness.

Cross-examination.

Mr. LOFTUS.—Q. Where is the Margarita Vineyard?

A. East of Fresno, between Sunnyside and Sanger railroad, they used to call it.

Q. Who was operating that vineyard when you first purchased grapes there?

A. I don't know; the owners, I suppose. I got them from their foreman.

Q. Do you know the names of anyone connected with the vineyard at that time? A. No.

Q. In what form did you buy the grapes? Did you purchase the grapes?

A. I used to have my empty boxes and I would pick and fill them, put them in my boxes and then peddle them.

Q. And there was no name on the box whatever, then, was there?

A. Probably there was our name on it.

Q. Your name?

A. Yes. I used to carry around boxes and fill them with grapes, put the grapes in our own boxes.

Q. But there was no name "Lady Fingers" affixed or stamped on the box, was there? A. No.

Q. And you didn't see any boxes or packages around there at that time bearing the name "Lady Fingers," did you? A. No.

(Testimony of Joseph Arkell.)

The COURT.—Q. When you would go to buy grapes, what did you ask for?

A. I asked for those long, white, grapes and he says [88] “Lady Fingers”? and I said “Yes.” So I learned from him there that it was “Lady Fingers.”

Mr. LOFTUS.—Q. Who was this gentleman that you learned that from?

A. The Margarita Vineyard foreman.

Q. What was his name?

A. The foreman or owner. I don't know the name,—the man in charge. Those grapes were right close to the buildings, close to the farm houses.

Q. And you can't recall to-day the name of any individual that told you that was the “Lady Finger” grape? A. No, I don't know his name.

Q. You don't know his name? A. No.

Q. How old were you at that time?

A. Between 15 and 20 years, I should judge; between 15 and 18; because that is the time I followed that occupation.

Q. Then you can't fix the date within 3 years?

A. Well, yes, in that neighborhood.

Q. That would be between what years?

A. Well, if I was 15—if I was 15 years old, it would be 40 years ago, and if it was when I was 18 years old it would be 37 years ago.

Q. And you don't know which it was? A. No.

Mr. LOFTUS.—That is all.

(Testimony of Joseph Arkell.)

Redirect Examination.

I quit peddling grapes when I was about 19 or 20 years old. That was over 35 years ago.

Mr. CONLEY.—That is all.

(Witness excused.)

TESTIMONY OF BEN H. ARKELIAN, FOR
DEFENDANTS.

BEN H. ARKELIAN, one of the defendants, a witness on behalf of defendants, being first duly sworn, testified as follows:

I reside in Modesto, California. I am 43 years of age. [89] I was born in Fresno, California, and lived there all my young life. I am now a grape grower and shipper. I have a little over 2,000 acres of grapes of many varieties growing at the present time. I know the "Lady Finger" grape. I have been growing that grape since 1920. Prior to that time I never made any sales of "Lady Finger" grapes. I have about 110 acres of "Lady Finger" grapes growing. Prior to the institution of this suit, I never heard that particular variety of grapes called by any other name than "Lady Finger." I first saw this variety of grape in my boyhood days when I was approximately 10 years of age. That was on the Eiseman Vineyard. At that time my father told me the name of the variety of grapes. He gave me the translation of the Turkish or Armenian word meaning "Lady Finger." I made a shipment of grapes to Port-

(Testimony of Ben H. Arkelian.)

land, as testified to by Mr. Humphrey. I think there was approximately 200 boxes in the car. That would be about a fifth of a carload.

Q. Did you cut any prices on them up there?

A. I did not.

Q. I will ask you—and you say you have been shipping these grapes for the last 5 or 6 years—under what brand have you been shipping them?

A. “Enchantress” Brand.

Q. This is a sample, I presume, of your brand?
(Handing the witness a label.) A. Yes, sir.

Q. I will ask you if you have, during all that time, shipped the grapes with the idea of imposing on anybody or making them believe they were Mr. Humphrey’s “Lady Finger” grapes?

Mr. LOFTUS.—That is objected to—

The COURT.—Overruled.

A. I did not.

The COURT.—A. That form of label you have in your hand, do you use that for all brands you have?

A. All. [90]

Q. And then you have a rubber stamp to indicate the variety?

A. Sometimes in rubber stamp and sometimes in printing.

Q. Do you use that same label for other grapes?

A. Yes, sir. I use this label for other grapes,—all other grapes.

Q. And if it is another variety of grape you put

(Testimony of Ben H. Arkelian.)

a different name on it,—either stamp it on there with a rubber stamp or print it on; is that it?

A. Yes. In this case there was a Carignane label, printed by the lithographing company, which has been scratched out and Lady Finger printed here. (Indicating on label.)

Q. I mean you have one style of label for all your grapes?

A. Yes; one style of label for all grapes.

Mr. CONLEY.—I will ask you whether or not the Carignane grape is entirely different, an entirely different grape than the “Lady Finger” grape?

A. Yes; and it has a different mark.

Q. How many carloads of grapes—

A. (Interposing.) The only thing we have for it, representing grapes, are some small, round, grapes, representing earrings for the ladies. (Referring to the label.)

Q. This label was not made there with the idea of reproducing any “Lady Finger” grapes?

A. None, whatever.

Q. They are not shaped at all like the “Lady Finger” grapes, are they? A. No, sir.

Q. Why did you use that rubber stamp; what is the reason for that, Mr. Arkelian?

A. Well, we have used the rubber stamp at such times as we did not have printed labels; that we would be out of printed labels with the word “Lady Finger” on them.

Q. Well, isn't there a legal requirement to do that?

(Testimony of Ben H. Arkelian.)

A. The County and the State require us to put the name on the variety of the grape on each container. [91]

Mr. CONLEY.—I think that is all.

Cross-examination.

Mr. LOFTUS.—Q. Will you describe the location of the Eiseman Vineyard where you saw these grapes growing when you were 10 years old and which you say were called “Lady Fingers”?

A. To the best of my recollection it was the east side of the driveway going to the winery, near Fancher Creek, a canal going through there called Fancher Creek.

My father was a grape grower, when I was 10 years of age. He was not connected with the Eiseman Ranch. He had a place near the Eiseman Ranch, immediately across from the Roeding Nursery. I think it was in 1916 when I saw grapes packed in boxes and bearing the name “Lady Finger.” I saw them at the fair here in 1915, I believe. I don’t know whose grapes they were. I think they were grown in Exeter or Strathmore. I first heard of the “Lady Finger” grapes grown by Mr. Humphrey in 1919. I got the cuttings or wood from which I grew the grapes called “Lady Fingers,” from Mr. Lake, the constable at Escalon. I bought the brush on his vines for a number of years; also other people who had odd vines that Mr. Humphrey had given grape vines to. My fore-

(Testimony of Ben H. Arkelian.)

man tried to buy cuttings from Mr. Humphrey, but he didn't succeed.

Q. Now, you are familiar with the manner in which the retail dealer sells these grapes, are you not? A. Yes, sir.

Q. What is the usual manner? Isn't it true that he removes these grapes from the lug boxes and puts them in trays and displays them with a little card or sign in the window reading "Lady Fingers"?

A. In some cases. Most cases they are kept in the container.

Q. Doesn't the purchaser, so far as you know, as far as you have observed, buy these grapes in bunches or by the pound, [92] ordinarily, out of a window display tray,—does he not, or out of the boxes? The grapes cannot be handled any more than can possibly be helped. In some cases the dealers may put them on a stand, take them out of the boxes and lay them on a tray? A. Yes.

Q. And in some cases they put them in a little pile in the window. They pile the grapes up in the window and put a little card or sign on top of the pile reading "Lady Fingers." Isn't that true?

A. No, sir. Mr. Humphrey happened to print a card, but we have any number of grapes that have no variety marked on them whatever.

Q. Did you ever see them displayed in trays with a small card printed "Lady Fingers"?

A. I have not. Not at any time.

Mr. LOFTUS.—That is all.

(Testimony of Ben H. Arkelian.)

Redirect Examination.

Mr. CONLEY.—Q. In what County of the San Joaquin Valley is the “Lady Finger” grape grown, to your knowledge?

A. Pardon?

(Question repeated.)

A. In Kern County, Tulare County, Fresno County, Stanislaus County.

Q. In Kern County, in Merced and Madera?

A. Not to my knowledge.

Q. For all you know, the green stock of your vines might have come from Mr. Humphrey’s place; isn’t that so?

Mr. LOFTUS.—That is objected to as leading.

The COURT.—Overruled.

Q. Do you know where they came from?

A. Yes. Some of the vines I got were off some brush that Mr. Humphrey had given these people. They originally came from Mr. Humphrey’s ranch,—that he had given away,—

Mr. CONLEY.—Q. Did Mr. Humphrey ever attempt—

A. (Continuing.) —and I think I got some from the seed farm at Davis. [93]

Q. Mr. Arkelian, you pay a great deal of attention to grape literature, do you not?

A. Somewhat.

Q. I will ask you if you have ever seen “Lady Finger” grapes advertised in any periodicals or State journals or newspapers in this State?

(Testimony of Ben H. Arkelain.)

A. The Government lists them on their market report. The county or the state inspection bureau writes certificates and calls them "Lady Fingers." Our County Horticulturist at Modesto, as well as Bakersfield, insists that we should put the word "Lady Finger" on the boxes because they are a "Lady Finger" grape.

Mr. CONLEY.—That is all.

Recross-examination.

Mr. LOFTUS.—Q. What year did you first see the "Lady Finger" grapes on the Eiseman Ranch; what was the year?

A. Along about '95,—'98.

Mr. LOFTUS.—That is all.

(Witness excused.)

Mr. CONLEY.—That is our case, your Honor.

Mr. LOFTUS.—I will call Mr. Baber.

PLAINTIFF IN REBUTTAL.

TESTIMONY OF EDWARD I. BABER, FOR PLAINTIFF (IN REBUTTAL).

EDWARD I. BABER, a witness on behalf of plaintiff, being first duly sworn, testified as follows:

I live in San Francisco; I am 74 years of age. From the year 1880 to about 1916 or '17 I was employed at the Eiseman Vineyard. I was manager there.

Q. Did you ever know, during that period, of any grape being grown there on that ranch or vineyard

(Testimony of Edward I. Baber.)

and which was sold under the name of "Lady Finger"?

A. Sold or marked "Lady Finger"? [94]

A. We never had such a grape. The vineyard never had such a grape; not under that name.

Q. Referring now to this variety of grape which is grown on the east portion of the vineyard, what was that grape called?

Q. I had several varieties there.

The COURT.—Q. Well, do you know any variety called "Lady Fingers"?

A. Not that was grown on that vineyard.

Q. Did you ever hear of any grape of that name?

A. I heard of the name.

Q. Do you know what they are referring to here, what kind of a grape? A. Yes.

Q. But they had nothing of that kind on that ranch? A. None, whatever.

Q. Nothing that looked like it?

A. Nothing that looked like it.

Mr. LOFTUS.—That is all.

Cross-examination.

On the Eiseman Vineyard I grew table grapes and wine grapes principally. Of the table grapes there were Malaga, Emperor, Muscat, Thompson Seedless and several other varieties.

Q. What are the several other varieties? There was a long, white grape that you raised there, wasn't there? A. A long, white grape?

Q. Yes. A. We raised a round grape.

(Testimony of Edward I. Baber.)

Q. I will ask you if you didn't raise a long, angular, white grape on the Eiseman Vineyard?

A. A White Cornichon, we raised, yes.

Q. White Cornichon? A. Yes.

Q. Describe that White Cornichon grape?

A. It is a grape,—a rather long grape, meat very hard and very light. [95]

Q. Why did you call that a Cornichon?

A. Beg pardon?

Q. I say, why do you call that a Cornichon?

A. I don't know why it was called "Cornichon." It was the name I knew it under.

Q. Did your ranch purchase the cuttings, or did you, personally, purchase the cuttings for those vines? A. No, I did not.

Q. That was planted there before you came there, wasn't it? A. It was planted there, yes.

Q. And you went there in 1880, didn't you?

A. 1880.

Q. And were those grapes sold in Fresno?

A. No.

Q. What became of them?

A. They were picked with other grapes and used for distilling purposes, for making brandy.

Q. Were they sold at all? A. Never.

Q. Did you ever see any grapes sold on the Eiseman Vineyard? A. Yes.

Q. Did you ever sell any white varieties?

A. Several white varieties.

Q. You sold Cornichons, didn't you? A. No.

Q. Did you sell any other variety?

(Testimony of Edward I. Baber.)

A. We sold that grape called "Palomino Blanco."

Q. That is a long, white grape, isn't it?

A. No, sir; it is a long, oval-shaped grape. It is of the Malaga family. It is a variety that we planted for making sherry, for making wine. That was the original purpose of planting that grape.

Q. And were those grapes grown on the east side of the road, or on what side of the road were they grown?

A. What side of the road were they grown on?

Q. Yes.

A. They were planted on our east line.

Q. On the east line?

A. Yes. On the east line of the section.

Q. And you heard the description given by Mr. Arkelian as [96] to the location of the grapes he saw growing on that vineyard, didn't you?

A. Yes.

Q. And did he give the correct description as to the location of the Cornichon grapes grown to the east of the avenue or road?

A. We had no Cornichons growing there. I only had four vines of the Cornichon variety in the vineyard, in the nursery.

Q. I will ask you to take a look at these—please take a look at this label, this picture here, and say whether there were any grapes of this shape growing on that vineyard?

A. I had a grape somewhat similar to one of these.

Q. And what did you call that?

(Testimony of Edward I. Baber.)

A. Zabalkanskoi.

Q. Will you describe this grape to the Court?

A. They are a red grape, long and very meaty, and narrow.

Q. That is all I care for. And they were a red grape? A. Yes.

Q. And were there any other varieties of white grapes, other than those you mention, growing on that place?

A. Yes. We had so many different varieties I can't recall them to mind what we did have. We had a nursery of them.

Q. Did you have any Feherszagos?

A. Yes, we had the Feherszagos, another white variety.

Q. You say you did have Feherszagos?

A. Yes.

Q. How are they shaped,—angular or round?

A. No. They were kind of oblong,—an oblong grape, somewhat; very deep skinned; they were all wine grapes. They were used for wine purposes.

Q. These Cornichons that were grown there resembled that grape? (Showing witness a label.)

A. They were not as long as that.

Q. Well, they were about that shape, about the same shape, weren't they?

A. Well, somewhat similar to that.

Q. Somewhat similar to this?

A. Somewhat similar to that one, yes.

Mr. CONLEY.—That is all. [97]

(Testimony of Edward I. Baber.)

Redirect Examination.

Mr. LOFTUS.—Q. And they were always called “Cornichons,” were they, Mr. Baber?

A. Yes. I say, we had 4 vines of this variety.

Q. Are you familiar with the adjoining ranch there in Fresno, known as the Margarita Vineyard?

A. Yes.

Q. Have you ever been over that property?

A. I have been across it from time to time.

Q. During this period between 1880 and 1916?

A. Yes. Several times I have been across it.

Q. And did you ever see a “Lady Finger” grape being grown there?

A. No, I have never known of it being grown there.

Q. Or any grape that was called “Lady Finger” there?

A. No. I never heard any of the parties connected with that vineyard speak of the grape, “Lady Finger.”

The COURT.—Q. When was the first time you heard the term “Lady Finger” applied to a grape?

A. Well, I have heard the word “Lady Finger” on the vineyard, I believe.

Q. How long ago?

A. It must have been somewhere during my time that I was on the vineyard. I couldn’t specify what year it was. In the course of conversations with other gentlemen that came on the vineyard,—they spoke about grapes and possibly the “Lady Fingers” came up during those conversations.

(Testimony of Edward I. Baber.)

Q. Would that be from the beginning of your managership of the ranch?

A. Some time during it.

Q. During the early or late part?

A. I couldn't say that; I can't remember.

Q. When you spoke in an undertone just a moment ago I thought I heard you say 1890?

A. No, I couldn't say definitely. If it had been mentioned it was just in the course of conversations.
[98]

Q. You would remember whether it was in 1890 or 1916, wouldn't you?

A. It wasn't in 1916; I am positive of that.

Q. It was long before that, was it?

A. It must have been whilst I was on the vineyard. It must have been.

Q. Well, you have been in the grape business all your life, haven't you? A. Pretty nearly.

Q. Now, you can't say when you first heard the word "Lady Finger" applied to a grape?

A. No, I couldn't say.

Q. Have you always heard that name applied?

A. Beg pardon?

Q. Have you always heard it applied to grapes?

A. No. I suppose in speaking of different varieties that name might have come up, "Lady Fingers," but it is a grape that is very seldom spoken about. I very seldom heard the name mentioned, "Lady Fingers," but I have heard it.

Q. But you could not fix the time when you heard it? A. No, I could not.

(Testimony of Edward I. Baber.)

Q. Would you say it was within 10 years after you went on to the Eiseman Vineyard in 1880; would you say it was between 1880 and 1890?

A. I could not tell you sir.

Q. You could not say? A. No.

Q. Anyhow, it is nothing new, is it?

A. Well, it is something that came along and passed from my memory entirely, the name of the grape. I never took up—never mentioned the name particularly—never spoke about it very much.

Mr. LOFTUS.—You didn't have any "Lady Finger" grapes on that place, did you?

Mr. CONLEY.—Just a minute. What was that?
(Question read.)

A. We didn't have any.

Q. If it can be said that this Cornichon grape is a "Lady [99] Finger" grape or looks like a "Lady Finger" grape, you only have 4 vines of that?

A. Yes.

The COURT.—Q. The Cornichon does look something like the "Lady Finger" grape, does it not?

A. Yes. We had those 2 varieties, the red and the white. We had a nursery in which we had 4 vines of each kind.

Q. And the first time you heard the name "Lady Finger" mentioned as applied to a certain variety of grape, was down there on that Eiseman ranch, was it?

A. Yes, sir. It must have been down there.

Mr. LOFTUS.—That is all.

(Testimony of Edward I. Baber.)

Mr. CONLEY.—Q. You and I have lived down there in that county for a long time, haven't we?

A. Yes, sir.

Q. Let me refresh your recollection now. I think I can do it.

Q. Do you remember the first time you saw the grape called the "Lady Finger" grapes?

A. I never saw one.

Q. You never saw one in your life?

A. Never saw one.

Q. When was the first time you ever saw a grape that looked like this (showing witness an illustration)?

A. I never saw one, outside of the Cornichons.

Q. Well, we will call it the Cornichon, then.

A. That is the nearest resemblance I have seen to it.

Q. Haven't you ever seen grapes like this for sale in Fresno County as early as 1884?

A. No, I have not, indeed.

Q. Did you ever see these so-called "Lady Finger" grapes in boxes for sale in Fresno as early as 1890?

A. I have never looked at them, sir.

Q. You never saw these so-called "Lady Finger" grapes,—and you can call them Cornichons, if you want to—didn't you see [100] these grapes on sale in Fresno as early as 1890?

A. No, sir.

Q. Or 1900? A. No, sir.

(Testimony of Edward I. Baber.)

Q. You came to Fresno, frequently, didn't you, during that time?

A. Yes; but I didn't take any notice of it. I attended to my business, and that grape not being connected with me, didn't take my attention or didn't attract my attention in any way.

Q. How many varieties of grapes did you raise on the Eiseman ranch?

A. I raised, I guess I raised—I guess I had 250 varieties.

Q. You had 250 varieties, and you had a few vines of these "Cornichons," as you call them, and quite a large acreage of the other, and, as a matter of fact, you didn't pay any attention to the grape itself, did you? A. Yes, we did.

Q. We did. But I mean you, personally?

A. Yes.

Q. What was your business there?

A. To find out the grape most suitable for wine.

Q. You were a wine producer?

A. Wine grape producer and viticulturist.

Q. Did you ever see any grapes that looked like this (showing witness an illustration) on sale in Fresno between 1880 and 1890?

A. On sale in Fresno?

Q. Yes. A. I don't remember.

Mr. CONLEY.—That is all.

(Witness excused.)

TESTIMONY OF S. A. LINES, FOR PLAINTIFF (IN REBUTTAL).

S. A. LINES, a witness called on behalf of plaintiff, in rebuttal, being first duly sworn, testified as follows:

I live in San Francisco. I am a fruit shipper and vineyardist—grower. My properties are located in Fresno County. [101] I have been connected with the Earl Fruit Company since about 1902 or '03 and I have that number of years' experience in grape-growing, or in connection with it. Prior to that time I lived in Fresno, but had nothing to do with the fruit business. I am familiar with Eiseman ranch, near Fresno. I was manager of the Earl Fruit Company,—I was local agent in Fresno for the Earl Fruit Company, about 1902 or '03 and the Earl Fruit Company handled all the table grapes from the Eiseman Vineyard from that time until it was sold. I have been over that property many times. In that connection I never saw or heard of any grapes called "Lady Fingers" being grown there. I am familiar with the east line portion that has been referred to here. I knew of no grapes grown on that portion or on the Eiseman Vineyard called or marked "Lady Fingers." I think I first became acquainted with the words "Lady Fingers" when Mr. Humphrey made his plantings at Escalon. That must have been about 1912 or '13, during 1914, possibly; along in there. I am acquainted with the other vineyard

(Testimony of S. A. Lines.)

that has been referred to here, the Margarita Vineyard. I have probably been over that property also, but not often; very seldom. I never heard of any "Lady Finger" grapes being grown on the Margarita Vineyard.

Q. Did you handle a grape, or did you, while you were connected with the Earl Fruit Company, which had somewhat the appearance of the grape which is shown here in this exhibit, Plaintiff's Exhibit 2?

A. We handled Mr. Humphrey's account or his grapes for a few years. I became familiar with the grape when we handled his account at Sacramento.

Mr. LOFTUS.—That is all.

Cross-examination.

Mr. CONLEY.—Q. How long did you live in Fresno?

A. I lived in Fresno—I came there in 1888.
[102]

Q. And you left, when?

A. About 1914 or '15, I think.

Q. Did you ever hear of the term "Lady Fingers" being applied to grapes up there during your residence there? A. Fresno, you mean?

Q. Yes.

A. Not until I became acquainted with Mr. Humphrey.

Q. Did you ever hear it there, ever hear the word "Lady Fingers" applied to grapes; or did you

(Testimony of S. A. Lines.)

ever see any "Lady Finger" grapes for sale in Fresno? A. I did not.

Q. Did you ever observe these fruit stands that are on the street there?

A. I presume I have, as I passed them.

Q. Would you know a "Lady Finger" grape if you saw one? A. Yes.

Q. Did you ever see any grapes that looked like these grapes, grown in Fresno? A. Yes.

Q. Where?

A. I don't recall where, but I have seen grapes that looked like them.

Q. You have been out on the Carmelita Vineyard, have you not? A. Yes.

Q. Didn't you see a grape that looked like that grown there?

A. I don't know. I have never been over the Carmelita Vineyard. I just passed through.

Q. Did you make any inquiry at any time while you were on the Carmelita Vineyard as to whether or not there were "Lady Finger" grapes grown there? A. No.

Q. Did you make an inquiry as to whether or not there were any "Lady Finger" grapes grown in Fresno or Tulare Counties? A. No, I did not.

Q. Why, you shipped these very grapes, did you not, in the Earl Fruit Company, shipped them east and under the name "Lady Finger," did you not?

A. No. [103]

Q. There were no grapes that were ever shipped

(Testimony of S. A. Lines.)

by the Earl Fruit Company from Fresno with the name "Lady Fingers" designated on the boxes?

A. Not to my knowledge.

Q. Well, you would know if there were, wouldn't you? A. Yes.

Q. And you are prepared to say there were not?

A. I—not to my recollection. I never saw the grape until I was on Mr. Humphrey's place and saw his vines.

Q. Did you ever see them afterwards in any other vineyard? A. Yes.

Q. Where?

A. In the northern part of the state, I think. I think there are a few vines, probably, along the American River up there.

Q. Along the American River?

A. Yes, not in any quantities, however.

Q. By what name are they known there?

A. I don't know; they don't ship them.

Q. Did you ask what the name was? A. No.

Q. You didn't ask what they were when you saw them? A. Yes, I did.

Q. What were they?

A. They were the same grapes as Mr. Humphrey had, known as "Lady Fingers."

Q. Did you ever see any in any of the Southern Counties? A. No.

Q. You have been in Exeter, and you have also been in Lindsay, haven't you? A. Yes.

Q. Don't you know, or did you ever hear of any being grown up there? A. Not to my knowledge.

(Testimony of S. A. Lines.)

Q. Or in Kern County or Tulare County?

A. Not to my knowledge.

Q. Or Sutter County? A. No.

Q. You never heard of them being grown there, either? A. No. [104]

Q. Did you ever see any grapes in the San Joaquin Valley, either on the vines or in boxes or trays, other than Mr. Humphrey's, that bore a resemblance to these grapes? A. Yes.

Q. Where?

A. I don't recall the vineyards, but I have seen them. The White Cornichon resembles that grape, mostly in appearance, or mostly on the color; the White Cornichon is a large grape at the upper end of the berry and small at the point.

Q. What is the part of the business of the Earl Fruit Company that you were entrusted with?

A. I was the general manager for about 10 years.

Q. Did you go out and examine vineyards?

A. Not very much.

Q. Not very much. You stayed in the office, did you not, Mr. Lines? A. Yes.

Q. And sent the boys out to look them over?

A. Yes, of course, they did most of it.

Q. And you are not a grape expert?

A. Well, I might be very modest in that. I have had a great deal of experience in growing grapes. I have been connected with the grape business for the last 20 years.

Q. And you can tell the different varieties immediately on seeing them, can you? A. Yes.

(Testimony of S. A. Lines.)

Q. Can you tell us the difference in the appearance between the Cornichon and the appearance of one of these "Lady Fingers"?

A. Just as I have described it in the shape of the berry.

Q. Are you acquainted with the Rish Baba grape?

A. Not by that name.

Q. You never heard that term in your life before, did you? A. Not that name.

Q. Do you know anything about the Pizzutello di Roma? A. Yes.

Q. Does that resemble this grape, the "Lady Finger"? A. No. [105]

Q. In what respect does it differ?

A. The Pizzutello di Roma grows about like that (referring to illustration)—this grape (indicating).

Q. Yes. It grows straight.

A. No; just like a finger, straight out, almost as large as the lower point of the grape as it is at the upper end.

Q. Is there any variation at all between the upper half of the grape and the lower half of the grape? Is that smooth, or does it run in that shape?

A. No; that isn't it. The grape is much like your finger. It is much the same size all the way down.

Q. Does it come in in the center?

A. No; not the "Lady Finger."

Q. Not the "Lady Finger." Does it bulge out or does it resemble this shape? (Indicating.)

A. No, I wouldn't say so. The "Lady Finger"

(Testimony of S. A. Lines.)

is a long grape. That (indicating) is rather a small, round, grape.

Q. Just take a look at these (handing witness illustrations) and tell us which grape these shapes resemble?

A. Well, I should think it resembles this grape probably more than any of them. I don't think either one of them would resemble the grape. It would be nearest to that (indicating).

Mr. CONLEY.—I might submit to your Honor that it is a rather strange thing. We have here introduced in evidence a picture of a bunch of grapes introduced by the plaintiff and we have another one, another picture which shows a different shape and the witness now refers to the Khandahar grape as the real shape of the "Lady Finger" grape.

Q. (By Mr. CONLEY.) Did you ever cultivate any grapes yourself—raise them?

A. Yes, I have a vineyard.

Q. Is there a difference in the shape of grapes of the same variety that are grown in the San Joaquin Valley, the same variety of grapes grown in different places in the San Joaquin Valley?

A. I don't think so; not very much. [106]

Q. Would soil and climate conditions make a difference in the shape of the same variety of grapes between Fresno and Escalon, for instance?

A. I shouldn't think so.

Q. Well, do you know.

A. No, I do not know.

Q. Would there be any difference in the shape

(Testimony of S. A. Lines.)

of the same variety of grapes grown in Kern County and Fresno County? A. I don't think so.

Q. Is there any difference in the same variety of grapes,—any difference in the shape of the same variety of grapes grown in Sutter County and Fresno County?

A. I am not familiar with the grapes in Sutter County.

Q. Have you ever been on the Frank H. Wilson vineyard in Centerville Bottoms?

A. Yes, I have been through there.

Q. Did you notice any "Lady Finger" grapes growing there. A. No, I did not.

Q. Would you say there were none grown on that vineyard? A. Yes.

Q. You are certain of that?

A. Well, I never seen them.

Q. You didn't go there for the purpose of making an inspection or finding out whether there were any "Lady Finger" grapes grown on that vineyard, did you? A. I have been over the vineyard.

Q. Did you ever see any "Lady Finger" grapes on that vineyard? A. No.

Q. What does that vineyard consist of; what varieties? A. Almeria, Olivette Vandemian.

Q. Did you go all over that vineyard?

A. Well, I think I have been over it very well.

Q. Wasn't there at least 25 or 40 acres of these "Lady Finger" grapes being grown there?

A. I didn't see them. I never saw them and I have been all over the vineyard.

(Testimony of S. A. Lines.)

Q. You were all over the vineyard and you never saw any "Lady Finger" grapes on that vineyard?

A. No, I did not. [107]

Q. How long ago were you over that vineyard?

A. He has about that acreage of the Olivette Vandemian.

Q. Are they "Lady Fingers"? A. No.

Q. Are they of the same shape?

A. Well, they are rather a long grape, yes.

Q. Do they look like a "Lady Finger" grape?

A. They have a resemblance to it. They don't look like this "Lady Finger" grape, but they have a resemblance.

Q. Well, you are certain, are you, they were not of this variety, the "Lady Finger" variety?

A. Not the grapes that I have reference to, no.

Q. And the Carmelita Vineyard; did you ever see any "Lady Finger" grapes on that vineyard?

A. I have never seen them.

Q. Did you see any white grapes there?

A. Yes.

Q. Long grapes?

A. They have some Thompson Seedless on the Carmelita Vineyard. I have been over the Carmelita Vineyard very little. I am not familiar with it.

Q. I will ask you this question again. Did you see any grapes similar in shape to these "Lady Finger" grapes on the Carmelita Vineyard?

A. I don't recall seeing them, no.

(Testimony of S. A. Lines.)

Q. Were any of the cuttings from the Eiseman Vineyard sold by you? A. No.

Q. Or by the Earl Fruit Company?

A. You mean during the period that the Earl Fruit Company owned the property?

Q. Yes. A. Not to my knowledge.

Q. Weren't there a lot of those vines pulled up?

A. Not while we owned the vineyard.

Q. You have no knowledge of any cuttings being sold to anybody else?

A. They could not have sold any cuttings because we bought the vineyard in July and sold it in December.

Mr. CONLEY.—That is all. [108]

TESTIMONY OF L. ABRAHAM, FOR PLAINTIFF (IN REBUTTAL).

L. ABRAHAM, a witness called on behalf of plaintiff in rebuttal, being first duly sworn, testified as follows:

I live at present at 923 Eddy Street, San Francisco. I am just 25 years of age. I was born in Persia and educated at the American College at Urmia, Persia. I have been in the United States about six months now.

The COURT.—What are you going to prove by him, that this is a Persian grape and that the name of it is "Rish Baba"?

Mr. LOFTUS.—Yes.

The COURT.—That is already admitted; that it is a Persian grape, and the name of it.

(Testimony of A. B. Humphrey.)

Mr. LOFTUS.—For the purpose of the record, your Honor—

The COURT.—Well, it has been admitted. Why take up the time of the Court when it has been admitted?

Mr. LOFTUS.—Very well. That is all.

(Witness excused.)

TESTIMONY OF A. B. HUMPHREY, FOR
PLAINTIFF (RECALLED IN REBUT-
TAL).

A. B. HUMPHREY, a witness for plaintiff, previously sworn, recalled, testified as follows:

Direct Examination.

Mr. LOFTUS.—Q. Do you recall and effort on the part of the foreman representing Mr. Ben H. Arkelian in connection with buying cuttings or wood from your place?

A. Yes.

Q. What was that transaction?

Mr. CONLEY.—We object to that, if your Honor please, on the ground that it is incompetent, irrelevant and immaterial.

The COURT.—What difference does it make, Mr. Loftus? His testimony is that he understood his foreman attempted to get some cuttings and you asked him if he got them and he said “No.” What has that got to do with his case? What difference does it make? [109]

(Testimony of A. B. Humphrey.)

Mr. LOFTUS.—To show he is not selling these cuttings.

The COURT.—He stated he was not selling the cuttings; and he stated that he had received requests from several people, a half a dozen or more each year, for cuttings and that he gave them away, two to each one who asked for them; that he would not sell them.

The WITNESS.—And, in addition to that, people—neighbors, who came on the vineyard and worked, if they wanted one or two cuttings to plant around the house and asked for it, I gave it to them.

The COURT.—Q. You never sold them?

A. Never sold them. I never sold any cuttings.

Mr. LOFTUS.—Q. In connection with those cuttings you did give away, however,—any of those people using this name “Lady Fingers” have done so without your license or consent?

A. Nobody has ever used that name “Lady Fingers” except two people and they have a special license from me, “Shipped under the supervision of A. B. Humphrey Company”; and when they bring the fruit and put it in my cars, I put that on. If they pick the fruit and take it to somebody else’s packing-house, they have to put some other name on there, and they understand that.

The COURT.—Q. And those two people are whom?

A. George Winkelman is one.

Q. And who is the other man?

(Testimony of A. B. Humphrey.)

A. H. W. Bartel, but that is under the name of H. J. Stevens. Mr. Bartel is his son-in-law. Mr. Stevens owned a vineyard opposite me and we shipped out fruit together for convenience.

Mr. LOFTUS.—Are you familiar with the recent catalogues put out by the Fancher Creek Nursery, which was formerly operated by George C. Roeding?

A. I saw them this morning. They were handed to me, but I have in the last—since this matter came up I have [110] looked in the catalogues to see if “Lady Fingers” was there.

Q. And how is the variety of grape that you found, the appearance similar to the “Lady Finger” variety listed in the recent catalogues of the Fancher Creek Nursery?

A. Well, it is a distinctly different variety. It is the Olivette Blanche. I could draw the 3 grapes very easily if I had a paper.

Q. Will you describe what the difference is between the Olivette Blanche, the White Cornichon, and the one which bears your trade-mark, “Lady Finger”?

A. Yes.

Q. Describe that?

A. My grape is similar—I could draw it easily,—all 3 grapes side by side, if the Court thinks it is necessary.

The COURT.—I hardly think it is necessary. The only question here is whether, when you began to call your grapes the “Lady Finger” grapes, whether or not they were known as “Lady Finger”

(Testimony of A. B. Humphrey.)

grapes before that or not. It may be these other grapes, the Cornichon and others, were known as "Lady Finger" grapes long before you grew your grapes.

The WITNESS.—They were listed as "Cornichons" until after I began to advertise the "Lady Finger" grape. The "Lady Finger" grape is the most symmetrical grape of the three. It is the same shape at the stem end as at the bottom, rather square-shaped top and bottom. It gradually tapers at the stem end away to the center, a very slight taper, and there is on the other end a very slight taper toward the center.

The "Olivette Blanche," which has been designated now as "Lady Fingers," is a very wide grape at the top. When it grows perfectly it is always the shape of an ox heart. It is very wide at the top and comes to a point.

The "White Cornichon," all of my investigation leads me to think, is identical with the "Pizzutello di Roma." It is a grape [111] of Italian origin, grown largely around Rome, as near as I can find out, and it is the most misshaped grape of all three; and is the one that is called, often called, "Lady Fingers" in the last 6, 8 or 10 years. It is a one-sided grape. The stem is placed on one side at the top on the tip. One side is almost straight down. The other side bulges, with quite fine and decided cracks in the whole grape. It is a grape of comparatively poor quality as compared with "Lady Fingers," for the reason that it is tart and has

(Testimony of A. B. Humphrey.)

more seeds, which applies, also, to the "Olivette Blanche." It is a grape which never gets sufficient sugar to be a really palatable fruit.

Q. Are you familiar with the grape that is grown on the Carmelita Vineyard and which has been recently shipped and marketed as "Lady Fingers"?

A. I am. That is, I have had it called to my attention by my own agent.

Q. And have you seen the grape? A. I saw it.

Q. What type of grape is it?

A. It is an "Olivette Blanche." My agent in Los Angeles called me up, or, rather, called my attention to the fact—

Mr. CONLEY.—We submit this is hearsay and move to strike it out.

The COURT.—Describe it if you have seen it.

A. I have seen the grape.

Mr. LOFTUS.—Q. Well, is it the same as your "Lady Finger" grape?

A. No. It is an Olivette Blanche.

Mr. LOFTUS.—I offer this Fancher Creek Nursery Catalogue, 1927-1928, in evidence, with particular reference to page 10, showing the listing of that grape as the "Olivette Blanche."

Mr. CONLEY.—And it is also termed "Lady Finger," is it not? Is that so, Mr. Loftus?

Mr. LOFTUS.—In little script below that they have tried to make [112] it appear it resembles the "Lady Finger."

Mr. CONLEY.—Is that a statement of fact?

(Testimony of A. B. Humphrey.)

Mr. L O F T U S.—The heading is “Olivette Blanche.”

Mr. CONLEY.—I will submit this to the Court as to whether or not they have tried to make it anything, or as to whether or not they do make it appear as though it was “Lady Finger.”

(The catalogue was received in evidence, and marked Plaintiff’s Exhibit Number 7.)

The COURT.—(Referring to Exhibit 7.) The paragraph has the caption “Olivette Blanche,” the paragraph reading as follows: “Lady Finger. Berries are long or oblong tapering to a point on large conical bunches; skin thick, yellowish white; flesh firm, amber in color, juice, sweet and crackling. Season, September.”

Mr. LOFTUS.—Q. Does that describe the “Lady Finger” grape, Mr. Humphrey?

A. No.

Q. In what respect is it incorrect?

A. I don’t regard the “Lady Finger” grape as what you call “crackling,” which means when you put it in your mouth and bring your teeth down on it they split wide open. Oftentimes you imagine it makes a noise,—so full of meat, without a great deal of juice, that they split open when you bite them.

The COURT.—Q. What grape is that?

A. That is the Olivette Blanche. The “Lady Finger” grape has too much juice to do that. It has a firmer skin, although not as thick a skin, and the consequence being, as in the case of rains, the

(Testimony of A. B. Humphrey.)

Olivette Blanche will go to pieces with ordinary rain, whereas, the "Lady Finger" will not be affected by the same rain. This is because of the fact that the skin of the "Lady Finger" has a very close texture, like the skin of a toy balloon; it resembles the skin of a toy balloon, whereas the skin of the Olivette Blanche is thick, like the Tokay skin. And [113] the Tokay grapes and such grapes as that seem to absorb the rain, the moisture, to a greater extent, so that they are affected by the water more than the "Lady Finger" grape, although all grapes will be affected by continuous rains. We often, in the field, get a momentary rain, and some of these varieties, such as I have mentioned,—the Olivette Blanche, will often be past shipping where the other varieties, which has a skin that will resist the rain, will escape, and we can still continue to ship them. That is one outstanding characteristic of the "Lady Finger" grape. The "Lady Finger" grape, however, has a number of *characteristics from* any other grape. They taste sweet. The reason that the people notice that when they first eat them, that they taste sweet, and yet they don't really carry a great deal of sugar, as a matter of fact. The reason for that is that they carry less than half the acid of any other grape and, therefore, many people have told me they could eat that grape when they were unable to eat any other grape, because grape acid is not acceptable to a great many people's stomach. It also does not contain as much sugar as a good many other

(Testimony of A. B. Humphrey.)

grapes, and yet it tastes sweeter, because of the absence of the acid. "Lady Finger" grapes when they are perfect carry about 20 or 21 per cent sugar, with about 45 per mill acid. That is a term used by wine men to designate the acid content. The ordinary grape carries anywhere from 70, 80 or 85.

Mr. LOFTUS.—Q. Now, are you familiar with the requirements of this Standardization Act of 1927,—the California Fruit, Nut and Vegetable Standardization Act?

A. I am now, yes.

Q. Have you observed the markings on shipments of grapes by concerns other than the defendant Arkelian, which have met with the approval of this Act.

The COURT.—Is this proper rebuttal? [114]

Mr. LOFTUS.—Yes, your Honor, because the witness Arkelian testified that the only way he could mark these grapes was "Lady Fingers," and I wish to show by this witness that other people growing the same kind of grapes as the defendant Arkelian comply with the law by marking them otherwise.

The COURT.—Well, I suppose or presume that the reason he stated that, gave that testimony, is that that is the only name he knew them by and that that is the only name the Horticultural Commissioner knew them by in that county and he told him he would have to put that name on the boxes. I suppose Mr. Humphrey might not know that the people up in his neighborhood don't know that they

(Testimony of A. B. Humphrey.)

can ship these grapes up there under the name of "Lady Fingers" without naming them something else unless they ship through him, and two of them, at least, have conceded to his demands.

Mr. LOFTUS.—Q. In reference to shipments of white grapes in general, what marking would be sufficient to comply with these regulations or these requirements of the Standardization Act?

Mr. CONLEY.—We object to that on the ground that it is immaterial.

The COURT.—Objection sustained. It may be that it will be proper to mark a box of grapes "White Grapes." It may be that will comply with the law in one locality or in one part of the state but it may be that a commissioner or official somewhere else connected with the state government might refuse to permit a shipment to go that way and say to the shipper "These are commonly known as 'Lady Finger' grapes, and you mark them as 'Lady Finger' grapes or they don't go."

Mr. LOFTUS.—Q. Have you observed in your experience the use of the term just "White Grapes" as a marking for a variety of grapes?

Mr. CONLEY.—That is objected to as incompetent, irrelevant and immaterial.

The COURT.—Sustained. [115]

Mr. LOFTUS.—Q. Have you ever known of any objection being raised to white grapes being so marked?

The COURT.—There might be no objection in

(Testimony of A. B. Humphrey.)

his county at all. He might be able to ship grapes and give them any name.

Mr. LOFTUS.—This is a state act.

The COURT.—Yes. But he might call them white.

Mr. LOFTUS.—Merely white?

The COURT.—Sure, white grapes. He might mark them white grapes and they get by, while down in Fresno County you might have to put the name of what they are,—either “Lady Finger” grapes or whatever name the Horticultural Commissioner might tell you to put on them.

Mr. LOFTUS.—Q. Who passes on these questions as to the sufficiency of markings on grape boxes?

A. It emanates from the State Horticultural Commissioner on recommendations and goes to the Legislature.

The COURT.—Oh, I presume they have a man in every county and he inspects the shipments, does he not?

A. Well—

Q. Well, somebody does it? Doesn't somebody do it?

A. If there is any question raised the horticultural commissioner decides the matter.

Q. You put anything you want on the grapes, don't you?

A. If you want to comply with the law you do one, two or three things. The law says if you are not sure of the variety, “White Grapes” will be

(Testimony of A. B. Humphrey.)

sufficient to put on them and it lists the other grapes, most of the white grapes, under a special name.

Mr. LOFTUS.—Q. What is this “Rish Baba” grape that is listed in this same group?

A. It is a grape, as I understand from Professor Bioletti, an importation which he claims he identifies as the same grape to which I have given the name “Lady Finger.” As I said before, [116] Professor Bioletti claims that the “Rish Baba” grape is the same grape as the “Lady Finger.” He would like to have permission to come down to my place and make an investigation, he said. I gave him permission to come down there and do anything he wanted, but he came there when I was not there. He says, “I think I know your grape,” and I said, “I would be very pleased to have you come down to my place any time you want to,” but, as I say, he came there when I was not there and he afterwards told me, “I feel very sure it has all the characteristics of the ‘Rish Baba,’ and I feel sure the varieties are identical.” I said, “Be that as it may, I commenced naming the grape ‘Lady Finger’ 30 years ago, and I consider that is the name so far as I am concerned.”

Q. Have you observed the manner in which these grapes are displayed and sold by retail dealers?

Mr. CONLEY.—That is objected to as incompetent, irrelevant and immaterial.

The COURT.—Objection sustained.

Mr. LOFTUS.—This is in rebuttal.

(Testimony of A. B. Humphrey.)

The COURT.—That doesn't make any difference. It is all common knowledge. We have all passed by these fruit stores and fruit stands and can see how they are sold.

Mr. LOFTUS.—That is all.

Cross-examination.

Mr. CONLEY.—Q. You have told the Court now, as I understand it, that the name "Lady Finger" is applied to "Rish Babas," "Pizzutello di Roma" and "Olivette Blanche"?

A. I said in my experience I have known it to be.

Q. Yes. Known it to be? A. Yes.

Q. And how long have you known that to be the fact?

A. After my experience due to this competition.
[117]

Q. And how long ago was that?

A. I should say after I started out, after 3 years, and it kept getting worse and worse, why, I applied to my lawyers, I suppose, and had the name trade-marked.

Q. And you were informed at that time, were you not, that your grapes were "Rish Baba"?

A. I then applied for a trade-mark. I saw no other way to protect myself.

Q. I didn't ask you that. You have been told your grapes are, in fact, "Rish Baba" grapes and belong to that variety. Isn't that true?

A. Professor Bioletti says he considers it the same variety.

(Testimony of W. Flanders Setchel.)

Mr. CONLEY.—That is all.

(Witness excused.)

TESTIMONY OF W. FLANDERS SETCHEL,
FOR DEFENDANT (IN SURREBUTTAL).

Mr. CONLEY.—Q. Mr. Setchel, are you acquainted with the Frank H. Wilson place that is next to the Carmelita Vineyard?

A. Well, I was intimately acquainted with—

Mr. LOFTUS.—I can't see, if your Honor please, where this is surrebuttal. I haven't heard this name "Wilson" mentioned in the case at all.

Mr. CONLEY.—I will let you see it in a minute.

A. (Continuing.) I was intimately acquainted with the Frank H. Wilson place from 1916 to 1921.

Q. I will ask you if in that vineyard there is any acreage of "Lady Finger" grapes?

Mr. LOFTUS.—I object to that your Honor, and ask for a ruling on my objection.

The COURT.—Overruled.

Mr. LOFTUS.—Exception.

A. The Frank H. Wilson place adjoins the Carmelita Vineyard and we used to exchange our work a great deal, due to the water, the same water, and during those years I refer to I was on the Wilson [118] place three or four times a week. During that period there was about 30 acres of vines there, Mr. Conley. I do not know where the cuttings came from. I was intimately acquainted with and acquainted with the Roeding Nursery at the time and the Earl Fruit Company handled the grapes.

(Testimony of W. Flanders Setchel.)

Q. Do you know whether the Earl Fruit Company shipped any of those grapes at that time?

A. Yes, they did, and they handled them as "Lady Fingers," too.

Mr. CONLEY.—That is all.

Mr. LOFTUS.—Nothing.

(Witness excused.) [119]

IT IS HEREBY STIPULATED AND AGREED that the foregoing is a correct copy of the condensed trial record with testimony stated in narrative form as agreed upon by the parties.

CHAS. E. TOWNSEND,

WM. A. LOFTUS,

Counsel for Plaintiff.

CONLEY, CONLEY & CONLEY,

W. M. CONLEY,

MATTHEW CONLEY,

Counsel for Defendants.

Dated: February 6th, 1929.

Approved:

A. F. ST. SURE,

U. S. District Judge.

[Endorsed]: Filed Feb. 6, 1929. [120]

[Title of Court and Cause.]

PETITION FOR ORDER ALLOWING AP-
PEAL.

Plaintiff herein, A. B. Humphrey Company, a

corporation, feeling itself aggrieved by the decree made and entered in the above-entitled action on the 8th and 11th days of August, 1928, respectively, ordering that the above-entitled suit stand dismissed; that plaintiff take nothing by said suit; that the trade-mark of plaintiff, to wit "Lady Fingers," and Certificate of Registration issued by the United States Patent Office therefor, dated July 22, 1924, and numbered 186,739, are and each of these is void and of no force or effect; and, that defendants do have and recover from plaintiff their costs and disbursements incurred therein; and feeling itself aggrieved by the whole of said decree comes now by its solicitors and prays this Court for an order allowing the said plaintiff to prosecute an appeal from the said decree and from the whole thereof to the Honorable United States Circuit Court of Appeals for the Ninth Circuit under and according to the laws of the United States in that behalf made and provided, and for a further order fixing the amount of security which the said plaintiff shall furnish for costs upon said appeal, upon the furnishing of which the [121] certified transcript of the record and proceedings herein may be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit.

CHAS. E. TOWNSEND,

WM. A. LOFTUS,

Attorneys for Plaintiff.

Dated: November 8th, 1928.

[Endorsed]: Filed Nov. 8, 1928. [122]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Now comes the plaintiff herein, A. B. Humphrey Company, and specifies and assigns the following as the errors upon which it will rely on its appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the decree made and entered on the 8th and 11th days of August, 1928, respectively, ordering that the above-entitled action stand dismissed; that plaintiff take nothing by said suit; that the trade-mark "Lady Fingers" and the Certificate of Registration issued by the United States Patent Office therefor, dated July 22, 1924, and numbered 186,739, are and each of them is void and of no force or effect; and that defendants do have and recover their costs and disbursements incurred therein; and that said decree is erroneous and unjust to the plaintiff, because:

1. The above-entitled court erred in dismissing the bill of complaint herein with costs to defendants.

2. The Court erred in not granting the relief prayed for in the bill of complaint.

3. The Court erred in not finding the issues herein in favor of the plaintiff with costs against the defendants. [123]

4. The Court erred in ordering, adjudging and decreeing that plaintiff is not entitled to any relief whatever.

5. The Court erred in ordering, adjudging and

decreeing that the trade-mark "Lady Fingers" is void and of no force or effect.

6. The Court erred in ordering, adjudging and decreeing that U. S. Certificate of Trade-mark Registration No. 186,739, issued July 22, 1924, by the Commissioner of Patents, United States Patent Office, for the name "Lady Fingers" is void and of no force or effect.

7. The Court erred in failing to find the trade-mark "Lady Fingers" as applied to grapes was good and valid and was the sole and exclusive property of plaintiff herein.

8. The Court erred in failing to find that the evidence presented by defendants was insufficient to overcome the presumption of validity of a trade-mark duly and regularly registered according to law.

9. The Court erred in failing to find that plaintiff's predecessor in interest, Mr. A. B. Humphrey, was the first to adopt and use the name "Lady Fingers" in connection with grapes, and that the same had never been abandoned.

10. The Court erred in failing to find that plaintiff's trade-mark "Lady Fingers" had been infringed by defendants herein.

CHAS. E. TOWNSEND,
WM. A. LOFTUS,

Attorneys for Plaintiff.

Dated: November 8th, 1928.

[Endorsed]: Filed Nov. 8, 1928. [124]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

In the above-entitled cause, plaintiff having filed its petition for an order allowing an appeal, together with an assignment of errors,—

Now, upon motion of Messrs. Chas. E. Townsend and Wm. A. Loftus, attorneys for plaintiff, it is

ORDERED that the said appeal be and the same is hereby allowed to said plaintiff to the United States Circuit Court of Appeals for the Ninth Circuit, from the decree made and entered on the 8th and 11th days of August, 1928, respectively, and from the whole thereof; that the amount of plaintiff's cost bond be and the same is hereby fixed at the sum of Two Hundred Fifty Dollars (\$250.00).

IT IS FURTHER ORDERED that upon the giving of such cost bond a certified transcript of the record and proceedings herein be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit.

A. F. ST. SURE,

United States District Judge.

Dated: November 8, 1928.

[Endorsed]: Filed Nov. 8, 1928. [125]

[Title of Court and Cause.]

COST BOND ON APPEAL.

WHEREAS, the plaintiff in the above-entitled action has appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree in favor of the above-named defendant made and entered the 8th and 11th days of August, 1928, respectively, in the above-entitled action by the District Court of the United States for the Northern District of California, praying that the said decree may be reversed,—

NOW, THEREFORE, in consideration of the premises and of such appeal, the undersigned The Fidelity and Casualty Company of New York, a corporation organized and existing under the laws of the State of New York, and duly authorized to transact a general surety business in the State of California, does hereby undertake and promise on the part of the appellant that said appellant will prosecute his appeal to effect and will answer all damages and cost if he fails to make his plea good, not exceeding Two Hundred and Fifty Dollars (\$250.00), to which amount it acknowledges itself bound. In case of a breach of any condition thereof, said District Court of the United States for the Northern District of California may upon notice to them of not less than ten days proceed summarily in the action, suit, case or proceeding in which the same was given to ascertain the amount which such sureties are bound to pay on account of

such breach, and render judgment against them, and award execution therefore.

IN WITNESS WHEREOF, the said surety has caused these [126] to be executed and its official seal attached by its duly authorized agent at San Francisco, California, the nineteenth day of November, A. D. 1928.

THE FIDELITY AND CASUALTY COMPANY OF NEW YORK.

By W. L. DAWSON.

Approved this 20th day of November, 1928.

A. F. ST. SURE,
U. S. District Judge. [127]

State of California,
City and County of San Francisco.

On this 19th day of November, in the year one thousand nine hundred and twenty-eight, before me, Kathryn E. Stone, a notary public in and for the City and County of San Francisco, residing therein, duly commissioned and sworn, personally appeared W. L. Dawson, known to me to be the Attorney of the Fidelity and Casualty Company of New York, the corporation that executed the within instrument, and known to me to be the person who executed the said instrument on behalf of the corporation therein named and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my official seal in the County

of San Francisco the day and year in this certificate first above written.

[Notary Seal] KATHRYN E. STONE,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires March 1st, 1929.

[Endorsed]: Filed November 20, 1928. [128]

[Title of Court and Cause.]

ORDER TO SEND ORIGINAL EXHIBITS TO
CIRCUIT COURT OF APPEALS.

A. B. Humphrey Company, a corporation, plaintiff above named, having appealed to the Circuit Court of Appeals for the Ninth Circuit to reverse the judgment of the District Court for the Northern District of California, in the above-entitled cause,—

NOW, THEREFORE, IT IS ORDERED that all of the exhibits in the above-entitled cause be forwarded by the Clerk of the District Court above named to the Clerk of the Circuit Court of Appeals.

A. F. ST. SURE,

United States District Judge.

Dated: January 23d, 1929.

[Endorsed]: Filed Jan. 23, 1929. [129]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT ON APPEAL.

To the Clerk of the United States District Court:

Sir: Please incorporate the following papers, documents and exhibits in the transcript of record on appeal in the above-entitled cause, omitting title of court and cause and omitting copying of all documentary exhibits as specified below:

1. Bill of complaint.
2. Answer to bill of complaint.
3. Amendment to answer.
4. Interrogatories filed by plaintiff October 28, 1927.
5. Answers to interrogatories filed November 5, 1927.
6. Order dismissing bill, dated July 16, 1928.
7. Decree filed and entered August 11, 1928.
8. Petition for order allowing appeal.
9. Assignment of errors.
10. Order allowing appeal.
11. Citation on appeal.
12. Bond on appeal. [130]
13. Statement of evidence under Equity Rule 75.
14. Order forwarding original exhibits.
15. Clerk's certificate for transcript.
16. Stipulation extending time within which to prepare and present for settlement the evidence under Equity Rule 75.

17. This praecipe.

Very respectfully,
CHAS. E. TOWNSEND,
WM. A. LOFTUS,

Attorneys for Plaintiff and Appellant.

Dated: January 23d, 1929.

[Endorsed]: Filed Jan. 23, 1929. [131]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO TRANSCRIPT OF RECORD.

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing 131 pages, numbered from 1 to 131, inclusive, to be a full, true and correct copy of the record and proceedings as enumerated in the praecipe for record on appeal, as the same remain on file and of record in the above-entitled suit, in the office of the Clerk of said court, and that the same constitutes the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is \$——; that the said amount was paid by the plaintiff and that the original citation issued in said suit is hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 8th day of February, A. D. 1926.

[Seal] WALTER B. MALING,
Clerk United States District Court for the North-
ern District of California. [132]

CITATION ON APPEAL.

United States of America,—ss.

The President of the United States, to Ben H. Arkelian and Ben H. Arkelian & Co., GREETING:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's office of the United States District Court for the Northern District of California, Southern Division, wherein A. B. Humphrey Company is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable ADOLPHUS F. ST. SURE, United States District Judge for the Northern District of California, this 8 day of November, A. D. 1928.

A. F. ST. SURE,
United States District Judge. [133]

United States of America,—ss.

On this 20th day of November, in the year of our Lord one thousand nine hundred and twenty-eight, personally appeared before me, Thos. G. Goulden,

the subscriber, and makes oath that he delivered a true copy of the within citation to Messrs. Conley, Conley & Conley, by depositing same in the U. S. mails properly addressed to the office of the above-named attorneys at Fresno, California, postage prepaid, on November 8th, 1928.

THOS. G. GOULDEN.

Subscribed and sworn to before me at San Francisco, this 20th day of November, A. D. 1928.

[Seal]

FRANK H. SCHMID,
Deputy Clerk U. S. Circuit Court of Appeals for
the Ninth Circuit.

[Endorsed]: Citation on Appeal. Filed Nov. 20,
1928.

[Endorsed]: No. 5715. United States Circuit Court of Appeals for the Ninth Circuit. A. B. Humphrey Company, a Corporation, Appellant, vs. Ben H. Arkelian and Ben H. Arkelian & Co., a Copartnership, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed February 8, 1929.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Ap-
peals for the Ninth Circuit.

17
No. 5715

IN THE
United States Circuit Court of Appeals

For the Ninth Circuit

A. B. HUMPHREY COMPANY
(a corporation),

Appellant,

vs.

BEN H. ARKELIAN and BEN H.
ARKELIAN & Co. (a copartnership),
Appellees.

In Equity
Infringement of United
States Registered Trade-
Mark No. 186,739, July
22, 1924, "Lady Fingers"
for Fresh Grapes.

BRIEF FOR APPELLANT.

CHAS. E. TOWNSEND,

WM. A. LOFTUS,

Crocker Building, San Francisco,

Attorneys for Appellant.

FILED

MAY 28 1929

PAUL P. O'BRIEN,

CLERK

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No. 5715

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

A. B. HUMPHREY COMPANY
(a corporation),

vs.

BEN H. ARKELIAN and BEN H.
ARKELIAN & Co. (a copartnership),
Appellees.

Appellant,

In Equity

Infringement of United
States Registered Trade-
Mark No. 186,739, July
22, 1924, "Lady Fingers"
for Fresh Grapes.

BRIEF FOR APPELLANT.

STATEMENT OF FACTS.

This appeal is prosecuted from a decree (R. 31) entered by Judge St. Sure, sitting in the District Court for the Northern District of California, dismissing plaintiff's bill for infringement of the registered trademark* "Lady Fingers" as applied to fresh grapes. No opinion was rendered so we are left in doubt as to the grounds for the decision.

Plaintiff's assignor and President, A. B. Humphrey, adopted the name "Lady Fingers" as an arbitrary

(Appellant is referred to as "plaintiff" and the appellees as "defendants." "R" indicates the printed record page. All italics herein, unless otherwise specified, are ours.)

*See Plaintiff's Exhibit 1, Trademark Registration, No. 186,739, registered July 22, 1924.

trademark for fresh grapes in the year 1895 (R. 35) and has used the same continuously ever since in the shipment of large quantities of grapes to Eastern markets, showing conclusively interstate commerce over a period of nearly thirty years. Plaintiff applied the mark both by means of a rubber stamp affixed to boxes, and by labels and circulars attached to the boxes and to the cars containing this particular kind of grape that plaintiff sells under the trademark "Lady Fingers." There is in evidence the record of a stamp-manufacturer as plaintiff's Exhibit "5" showing the making of the rubber stamp containing the name "Lady Fingers" as early as August, 8, 1904. (R. 69.)

For twenty or twenty-five years plaintiff's use of its mark "Lady Fingers" was exclusive in every sense of the word; the first time Mr. Humphrey ever heard of anyone else using that word was in 1918 or 1920 (R. 39); this information coming through his agents in the East. (R. 54.) Who these infringers might have been does not appear, but it does appear that the infringement was promptly discontinued, by reason of plaintiff's alertness in asserting his rights to the mark. When we come to review the testimony we will see not only how continuous has been the use of the mark by the plaintiff and how generally the mark has been respected by the trade, but how recent, wilful and injurious the infringement has been by the defendants.

TRADEMARK REGISTRATION.

The trademark "Lady Fingers" was registered according to the Act of February 20, 1905, as amended February 18, 1909,* wherein and whereby it was asserted that the registrant had adopted and used the words "Lady Fingers" as a technical trademark for fresh grapes and had used the same in interstate commerce since September 1, 1895, and that the mark had been applied by being stamped with a rubber stamp directly on the boxes containing the goods or in any other suitable manner.

USE MUST PRECEDE REGISTRATION; USE CREATES THE RIGHT.

As said by Judge Wolverton in *Heileman Brewing Co. v. Independent Brewing Co.*, 191 Fed. 489 (9 C. C. A.) (page 494):

"* * * in this country a trade-mark is acquired by use, and the use must antedate registration. Without it registration cannot be had. By section 1 of the act of February 20, 1905, supra, the owner of a trade-mark domiciled in this country is entitled to have the same registered, and by section 2, in order to procure registration, he must show that such trade-mark is used in commerce among the several states or within foreign countries. So that registration comes only after acquirement of the right to a trade-mark by use. See, also, Hopkins on Trade Marks, Sections 25-27."

*Trade-Mark Act February 20, 1905, c. 592, Sec. 5. 33 Stat. 725 (U. S. Comp. St. Supp. 1911, p. 1461).

FEDERAL JURISDICTION.

It is by virtue of this Federal Registration (Sections 17 and 19),* and the fact that defendant shipped fresh grapes bearing the infringing trademark to Portland, Oregon (R. 39), that this suit is brought in a Federal Court.

ATTRIBUTES OF A REGISTERED TRADEMARK.

Of course a trademark is entitled to protection independent of registration. Registration, however, following due examination and scrutiny by the officials of the Patent Office, and a statutory declaration (Section 16)** of *prima facie* ownership gives rise to an added **presumption of validity**, just as with patents.

*Sec. 17. That the circuit and territorial courts of the United States and the supreme court of the District of Columbia shall have original jurisdiction, and the circuit courts of appeal of the United States and the court of appeals of the District of Columbia shall have appellate jurisdiction of all suits at law or in equity respecting trademarks registered in accordance with the provisions of this act, arising under the present act, without regard to the amount in controversy.

Sec. 19. That the several courts vested with jurisdiction of cases arising under the present act shall have power to grant injunctions, according to the course and principles of equity, to prevent the violation of any right of the owner of a trademark registered under this act, on such terms as the court may deem reasonable; and upon a decree being rendered in any such case for wrongful use of a trademark the complainant shall be entitled to recover, in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby, and the court shall assess the same or cause the same to be assessed under its direction. The court shall have the power to increase such damages, in its discretion, as is given by section sixteen of this act for increasing damages found by verdict in actions of law; and in assessing profits the plaintiff shall be required to prove defendant's sales only; defendant must prove all elements of cost which are claimed.

"Sec. 20. That in any case involving the right to a trademark registered in accordance with the provisions of this act, in which the verdict has been found for the plaintiff, or an injunction issued, the court may order that all labels, signs, prints, packages, wrappers, or receptacles in the possession of the defendant, bearing the trademark of the plaintiff or complainant, or any reproduction, counterfeit, copy, or colorable imitation thereof, shall be delivered up and destroyed. . . ."

***"Sec. 16. That the registration of a trademark under the provisions of this act shall be *prima facie* evidence of ownership. Any person who shall, without the consent of the owner thereof, reproduce, counterfeit, copy, or

“Though the act does not provide that registration of a trade-mark is **prima facie evidence of its validity**, the Patent Office is not authorized to register anything but a trade-mark. Incidentally, therefore, registration involves the consideration by the Commissioner of Patents of whether the device for which registration is sought may be the subject of exclusive appropriation as a trade-mark. That officer’s decision of that proposition is entitled to respect as being *prima facie* correct.” (*Nims, Second Edition*, Section 240, page 459.)

In the *Trade-Mark Cases*, 100 U. S. 82, 94, 25 L. Ed. 550, 552, Mr. Justice Miller, speaking for the Court, says:

“The ordinary trade-mark has no necessary relation to invention or discovery. The trade-mark recognized by the common law is generally the growth of a considerable period of use, rather than a sudden invention. * * * At common law the exclusive right to it grows out of its use, and not its mere adoption.”

Specimens of plaintiff’s trademark are in evidence as plaintiff’s exhibits “2” and “3” (R. 36-37); and a specimen of defendants’ infringement trademark “Ladyfinger” is in evidence as plaintiff’s exhibit “4.” (R. 42.)

colorably imitate any such trademark and affix the same to merchandise of substantially the same descriptive properties as those set forth in the registration, or to labels, signs, prints, packages, wrappers, or receptacles intended to be used upon or in connection with the sale of merchandise of substantially the same descriptive properties as those set forth in such registration. and shall use, or shall have used, such reproduction, counterfeit, copy, or colorable imitation in commerce among the several states, or with a foreign nation or with the Indian tribes, shall be liable to an action for damages therefor at the suit of the owner thereof; and whenever in any such action a verdict is rendered for the plaintiff, the court may enter judgment therein for any sum above the amount found by the verdict as the actual damages, according to the circumstances of the case, not exceeding three times the amount of such verdict, together with the costs.

It is to be noted that the defendants use the word "Ladyfinger" not only in a truly trademark sense but in a true trademark position, stamping it with a rubber stamp in conjunction with the picture of a young girl, and not using it in a descriptive sense or position as indicating the quality or name of the grapes themselves. The fact that defendants use the word "Ladyfinger" in conjunction with the more prominent mark "Enchantress" is immaterial.

Defendants' use of their own mark "Enchantress" and plaintiff's mark "Lady Fingers" on the same goods or on the same package does not alter the case nor prejudice plaintiff's rights. One mark or several different marks may be used on the same goods provided one has ownership. (*Loonew v. Deitsch*, 189 Fed. 487, 492; *Nims*, Section 194, page 382.)

The term "Lady Fingers" has become associated with plaintiff's business and that of its predecessor, Mr. Humphrey, as representing a grape which, if not originated by Mr. Humphrey, at least possessed certain peculiarities which have become, through long years, as particularly associated with the plaintiff and Mr. Humphrey. The fact that the grapes have a peculiar shape suggestive of the name given it by Mr. Humphrey in 1895 of course in nowise detracts from the merits of the trademark.

**“SUGGESTIVE” WORDS DISTINGUISHED FROM
“DESCRIPTIVE” WORDS.**

The words “Lady Fingers” are not *descriptive* of grapes in any trademark sense of those words. Words that are “suggestive” and valid marks, are illustrated in a long list in “Nims on Unfair Trade,” Second Edition, pages 393-4; (Third Edition, pages 529-30) and including, for example:

“Ideal” for brushes (209 Fed. 37);

“Wearever” for cooking utensils (226 Fed. 815);

“Elastic” for book cases (121 Fed. 185);

“Sliced Animals” for a game or puzzle (93 N. Y. 59);

“Holeproof” for hosiery (172 Fed. 859);

“Vogue” for periodicals (261 Fed. 420).

Where the primary purpose of the mark, as here, was to indicate origin, it is immaterial if it might also in a secondary sense indicate grade or quality, for, as said in *Capewell Horse Nail Co. v. Mooney*, 167 Fed. 575, 586:

“It is immaterial that the mark indicates grade as well as origin, and is also ornamental, if the primary purpose of adoption and use was to indicate origin.”

See also,

Dixie v. Stearns, 185 Fed. 431.

A TRADEMARK WHICH LATER MAY BECOME, BY USAGE, THE APPELLATIVE OF THE ARTICLE DOES NOT THEREBY LOSE ITS TRADEMARK SIGNIFICANCE.

Celluloid Mfg. Co. v. Cellonite Mfg. Co., 32 Fed. 94 (decision by Justice Bradley);
Fairbanks v. Central Lard, 64 Fed. 133 (Cottolene case);
Morgan's Sons v. Ward, 152 Fed. 690 (7 C. C. A.) (Sapolio case);
Lambert Phar. Co. v. Kalish Pharmacy, 219 Fed. 323 (Listerine case).

INFRINGEMENT OF RECENT DATE.

The defendant Arkelian while he testified (R. 106) that he started to grow so-called "Ladyfinger" grapes in 1920, does not say when he began shipping them. Apparently he did not get into production until some years later, as Mr. Humphrey testified (R. 39) that the first he heard of defendants' infringement was only about three years before bringing suit.

Mr. Humphrey immediately notified the defendant by letter of his registered trademark and requested that the infringement be discontinued. This warning was ignored by the defendants; hence the suit was commenced in September, 1927.

Bearing in mind that fresh table grapes are sold only for a short period each year, it is manifest that there has been no such delay on plaintiff's part in proceeding against defendants as would give rise to laches, especially in view of the timely personal notice given the defendants and the statutory notice

that has always appeared on the plaintiff's labels themselves.

The notice given by this plaintiff to the world of his trademark was quite sufficient, and it would be so even though he had given no notice other than affixing the mark to the goods.

“* * * it is entirely immaterial that the complainant did not impress on each nail or each package or carton the words ‘This check mark is our trade-mark,’ or advertise the fact that it had adopted the check-mark as its trade-mark. It is true that such a notice would have given notice to all who read it that the check-mark was claimed as a trade-mark, but I know of no law which requires a person to advertise his trade-mark, or to put a notice on it or on the goods on which it is found stating that the trade-mark imprinted or attached is a trade-mark.” (*Capewell Horse Nail Co. v. Mooney*, 167 Fed. 575, 584.)

THE INTENT OF THE DEFENDANT IS IMMATERIAL.

In *Layton Pure Food Co. v. Church & Dwight Co.*, 182 Fed. 24, the Court said (pages 33-34):

“They call attention to the fact that there is no testimony that the defendant ever intended to deceive any one into the belief that its goods were those of the complainant and none that any purchaser ever was deceived. But this cause is based solely on the complainant's ownership of a common-law or technical trade-mark. If the defendant infringes the right to that trade-mark, which is valuable property of the complainant, if it trespasses upon that property, the complainant is entitled to an injunction against the continuance of that infringement, whether its infringement was or is intentional or not and whether the trespass

upon the complainant's property was or is injurious or not. Intent and damage are immaterial here. *Hutchinson, Pierce & Co. v. Loewy*, 163 Fed. 42, 90 C. C. A. 1; *Lawrence Manufacturing Co. v. Tennessee Manufacturing Co.*, 138 U. S. 537, 11 Sup. Ct. 396, 34 L. Ed. 997; *Gannert v. Rupert*, 127 Fed. 962, 62 C. C. A. 594.

* * * * *

“The use of any simulation of a trade-mark which is likely to induce common purchasers, exercising ordinary care, to buy the article to which it is affixed as the product of the owner of the trade-mark, is an infringement of the owner's right and entitles him to equitable relief. *McLean v. Fleming*, 96 U. S. 245, 251, 24 L. Ed. 828; *Kann v. Diamond Steel Co.*, 89 Fed. 706, 711, 32 C. C. A. 324, 329; *Walter Baker & Co. v. Puritan Pure Food Co. (C. C.)*, 139 Fed. 680, 682.”

TRADEMARKS FOR NATURAL PRODUCTS.

A table grape is in no different category from a trademark standpoint than other natural products, such as mineral waters, fresh fruits, walnuts, oranges, &c., which latter today are generally sold with a trademark directly stamped thereon or printed on a wrapper. Merely because some grower happens to acquire plantings similar to those producing the “Skookum” apple, or “Desert Sweet” grapefruit, is no justification for employing that trademark without the original owner's consent.

Inasmuch as the quality of any such natural product depends in a large measure upon the care devoted to its cultivation, the time and manner in which it is picked, and the care exercised in packing and shipping, particularly where it is a perishable

commodity like table grapes, it is a fraud upon the public for anyone whose operations are not carried on under the direct supervision and control of the original owner of the trademark, to offer his goods for sale under that name, even though the stock which produces the product may be the same.

The fact that the trademark "Lady Fingers" is applied to grapes does not deprive plaintiff of a valid trademark for this natural product.

"It may also be laid down, upon reason and authority, that one who owns and controls the source of a particular natural product, such as a spring of mineral water, is entitled to be protected in the name given to that product, provided it is one otherwise subject to exclusive appropriation as fully and as completely as in the case of any artificial product of manufacture. *Contrass Spring Co. v. High Rock Spring Co.*, 45 N. Y. 295-300, 6 Am. Rep. 82; *Appollinaris Co. v. Sherer* (C. C.), 27 Fed. 18; *Hill v. Lockwood* (C. C.), 32 Fed. 389; *City of Carlsbad et al. v. Thackeray & Co.* (C. C.), 57 Fed. 18; *City of Carlsbad et al. v. Kutnow et al.*, 71 Fed. 167, 18 C. C. A. 24; *Northcutt v. Turney*, 101 Ky. 314, 41 S. W. 21; *Dunbar v. Glenn*, 42 Wis. 118, 24 Am. Rep. 395." (*Manitou Springs Mineral Water Co. v. Schueler*, 239 Fed. 593, 599-600.)

"The same rules that apply to names of manufactured articles apply to the names of natural products which have been rendered valuable by the owner's brains and labor, such as names of natural springs. The Wisconsin court, on the petition of the owners of the 'Bethesda Mineral Spring' enjoined the use of the name 'Glenn Bethesda Mineral Water' where the owners of the latter made misleading representations as to the ownership of the spring of the plaintiffs, the defendant's spring being 1200 feet away from theirs, although the two waters were identical in

their character. The decision was based on the court's belief that 'the rules laid down in respect to an artificial or manufactured article are said to apply to the proprietorship of any peculiar natural product which a party may have acquired with the avails of his industry, sagacity, and enterprise; the owner or vendor of the one, equally with the owner or vendor of the other, having a right to the exclusive use of his mark employed in connection with sale of the commodity.' " (Citing *Dunbar v. Glenn*, 42 Wis. 118-35-1877.) (*Nims, Second Edition*, page 217, Section 110.)

Note also such trademarks as "White Rock" for mineral water; "Canada Dry" for ginger ale; "Sun-kist" for oranges; "Calmyrna" (contraction of "California" and "Smyrna") for figs; and "Kodak" for cameras.

DEFENSES.

It is not clear from the record or the pleadings just what defendants depend upon for justification of their infringement. As near as we can make it out, the defenses may be summed up as follows:

(1) That because the trademark is applied to a natural product is not a valid trademark. The refutation appears *supra*.

(2) That assuming that it has true trademark characteristics, it is *publici juris* by reason:

(a) that the foreign synonym of "Lady Fingers" was used in Turkey and/or in Dalmatia prior to its adoption by Mr. Humphrey in 1895 as designating a particular kind of grape in those countries, although the proof in that regard is of a very suspicious and in-

adequate character, and the affirmative proofs show that neither plaintiff nor Mr. Humphrey knew of that fact, if such were a fact.

(b) That plaintiff occasionally gave to neighbors and friends a couple of cuttings of the vine from which plaintiff's "Lady Finger" grapes are grown, but with the admonition in each instance that although they could propagate grapes from these cuttings, they were not to call them by the name "Lady Fingers," and that as far as shown this admonition in every instance was followed.

(c) That within the last few years and quite recently and since plaintiff's mark has become widely known, certain publications have made random reference to the words "Lady Fingers" as denoting a variety of grape; it appearing affirmatively from the testimony that this was all without the knowledge or consent of the plaintiff.

(d) That quite recently, and within a few months prior to suit, the Horticultural Department of the State of California had made in an official publication a casual reference to "Lady Fingers" in a descriptive sense; but, as affirmatively shown, this use was protested by Mr. Humphrey (R. 58) and his rights recognized by Mr. Commissioner Hecke.

Whether a mark is *publici juris* depends on whether it belongs to the public as the common property of the trade and, therefore, not subject to appropriation by any one person, so that all men engaged in the business have an equal right to its use, belonging to no one individual either as a trademark or label. (*Corbin v. Gould*, 133 U. S. 308; 33 L. Ed. 611, 613.)

It is manifest that plaintiff's mark does not come in that category at all.

In defendants' brief below reference was made to the case of *Hoyt v. Lovett Co.*, 71 Fed. 173, but which is not in point. There the plaintiff was engaged in selling grape vines and the cuttings of the grape under the name "Green Mountain," to each vine or cutting was attached a tag bearing that name. Plaintiff's advertising stated: "This grape originated in the Green Mountains; hence its name." The Court held that the alleged trademark was descriptive, and furthermore, that the purchaser of the vines or cuttings from legitimate sources, which vines or cuttings bore the name "Green Mountain" had a right to sell the fruit under that name.

No such facts are to be found in the instant case, and plaintiff, in making a gift of a few cuttings to friends or neighbors, had no reason to expect that the recipients thereof would enter commercially into the growing or shipping of grapes marked "Lady Fingers," especially in view of the fact that the original and correct name of the grape is "Rish Baba;" and the further fact that **whenever Mr. Humphrey gave away a cutting he expressly told the recipient that "they could not call them Lady Fingers."** (R. 51.)

Moreover, the defendant is not one of those to whom plaintiff gave cuttings, and hence is in no position to claim a license or right to use the name "Lady Fingers." On the contrary, defendants were refused cuttings by plaintiff, and if they ever got any they acquired them from various sources. Defendants may

use the names "Rish Baba," "White Cornichon" or any other proper designating term depending on the varieties in their community.

(3) Another defense was that the term "Lady Fingers" has, within recent years and long after its adoption as a trademark by plaintiff and in a limited field, become a nickname for several varieties of grapes having the same generally elongated appearance, but known officially and by the public by the following names: the "Pizutello di Roma" Grape; the "Rish Baba" Grape; the "Olivette Blanche" Grape; the "Khandahar" Grape; the "White Cornichon" Grape, and several others.

"The unnecessary adoption of a part of a plaintiff's trade-mark—a part so substantial as to have become a trade-name or *nickname for the goods*—is generally regarded as an infringement. The use by a defendant of a trade-mark identical with the name which has been derived from a plaintiff's trade-mark proper, *and has become sufficiently descriptive of plaintiff's goods*, is the adoption of a mark which will cause its goods to bear the same name in the market. Neither subtractions from nor additions to a trade-mark proper will avoid infringement, when such imitation as is likely to lead to confusion still remains despite the changes. Hopkins on Trade-Marks, etc. (3d Ed.) Sec. 138, p. 321, and section 113, p. 279; Saxlehner v. Eisner, Mendelson Co., 170 U. S. 19, 33, 21 Sup. Ct. 7, 45 L. Ed. 60; Thomas G. Flant v. May Co., 105 Fed. 376, 44 C. C. A. 534; Gordon's Dry Gin Co., Ltd. v. Eddy & Fisher Co. (D. C.) 246 Fed. 954." (*Amson & Parson v. Narragansett Dairy Co.*, 252 Fed. 276.)

(4) Laches.

(5) Non-infringement, based apparently on the contention that plaintiff sometimes associates its name "Humphrey" with the registered mark "Lady Fingers," whereas the defendants associate the word "Ladyfinger" with the name "Enchantress." Plaintiff's registered trademark is "Lady Fingers" without accessory matter.

That there is no merit in any of these defenses is apparent from a mere reading of the record in the light of the law as to trademarks.

The words "Lady Fingers" are the exclusive property of the plaintiff whether with or without accessory matter. Plaintiff made that clear by his registration. Defendant makes much of the fact that plaintiff in its advertising associates its own name "Humphrey" along with the trademark "Lady Fingers"; in other words, that some of the advertising shows "Humphrey's Lady Fingers." The fact that the plaintiff associates its own name or other accessory symbols or words with its trademark "Lady Fingers" does not deprive plaintiff of its right to the trademark.

In the leading case of *Layton Pure Food Co. v. Church & Dwight Co.*, 182 Fed. 24 (8 C. C. A.), before Judges Sanborn and Van Devanter, a similar situation was disposed of in the following language (page 29):

"Counsel insist that the complainant can maintain no right to the exclusive use of the annular band as a trade-mark because it and its predecessors always used it in association with words,

such as 'John Dwight & Co.,' and with pictures, such as that of a cow, or an arm or hammer, upon their labels and never alone. But there is no rule of law and no reason that makes the use of a trade-mark alone upon the labels or packages that present the goods of a manufacturer or dealer indispensable to its existence. Such a rule would greatly diminish, if not destroy, the value of all trade-marks. It is the province and right of the owner, and not of the infringer, of a trade-mark to determine what shall constitute his trade-mark, and his first adoption and continued use of it perfects his title to it. Nor does he lose his right to the exclusive use of the mark he selects and adopts by placing on the label or package with it other words and symbols to assist in presenting and selling the goods he makes or offers for sale. The complainant in its declaration for registration of the annular band clearly stated that the lettering and symbols commonly used by it with the picture of the band might 'be changed or omitted at pleasure without materially altering the character of the said trade-mark the essential feature of which is the annular band.' The fact that the owner of a trade-mark uses in association with it accessory symbols or words does not deprive him of the right to it. *Walter Baker & Co. v. Delapenha* (C. C., 160 Fed. 746, 750; *Bass, Ratcliff & Gratton v. Feigenspan* (C. C.), 96 Fed. 206, 212; *Walter Baker & Co. v. Puritan Pure Food Co.* (C. C.), 139 Fed. 680, 682."

The first use of a trademark gives to the prior user the exclusive right to its use in trade to a commodity to which it is applied. (*Metcalf v. Hanover Star Milling Co.*, 204 Fed. 211, 216 (5 C. C. A.).)

The fact that the plaintiff sometimes associates the word "Humphrey" with the words "Lady Fingers" does not diminish plaintiff's rights, for, as said in

President Suspender Co. v. MacWilliam, 233 Fed. 433, 438:

“Even if it be true that the habit of years has transformed the trade-mark ‘President’ into the trade-mark ‘Shirley President’ yet it is also true that another man who manufactured the same thing under the name ‘President’ would infringe upon the trade-mark ‘Shirley President.’ *Foster v. Foster*, L. R. 7 (Chan.) 611; *Saxlehner v. Eisner*, 179 U. S. 19, 21 Sup. Ct. 7, 45 L. Ed. 60.”

In *Menendez v. Holt*, 128 U. S. 514, our Supreme Court said:

“Holt & Co., then, having acquired the exclusive right to the words ‘La Favorita,’ so applied to this particular vendible commodity, it is no answer to their action to say that there was no invasion of that right because the name of S. O. Ryder accompanied the brand upon flour sold by appellants, instead of the name of Holt & Co. That is an aggravation and not a justification, for it is openly trading in the name of another upon the reputation acquired by the device of the true proprietor. *Gillett v. Esterbrook*, 47 Barb. 455; s. c. 48 N. Y. 574; *Coats v. Holbrook*, 2 Sandf. Ch. 586.” (32 L. Ed. p. 526.)

There are certain other general principles regarding trademarks that are too well known to need comment, and the application of which to the case in hand is instantly apparent.

The fact that the trial Court by its decree has denied plaintiff relief and found the trademark and the United States certificate of registration each void and of no force or effect requires a more particular consideration of the facts of this case than would seem otherwise to merit.

We submit that a mere reading of the record ought to demonstrate to anyone the lack of any merit for such a decree, and that if anyone ever had a perfectly good trademark that is entitled to protection, it is this plaintiff.

HISTORY OF THE TRADEMARK "LADY FINGERS."

Mr. Humphrey, who is an agriculturist and horticulturist of high standing, testifies (R. 34) that he is 65 years of age, resides in Sacramento County and is president of the plaintiff corporation which was organized in 1917 or 1918; that the company does a general agricultural business, including the growing of grapes of all varieties; that the grapes are shipped in a green state entirely to all the large markets, including the large auction markets of the East; that prior to the organization of the corporation he carried on the same business individually; that the grapes grown and shipped by plaintiff are raised in Sacramento and San Joaquin Counties; and that on a particular variety of grape marketed by him and plaintiff, the trademark "Lady Fingers" is used.

These "Lady Finger" grapes were developed by the plaintiff and the name was an arbitrary one given to the fruit of these particular vines. The name was suggested by the shape of the grape. (R. 35-36.)

Regarding Mr. Humphrey's adoption of the words "Lady Fingers," he stated (R. 36):

"I made that decision in 1895. Prior to that time I had never heard of the name 'Lady Fingers' applied to grapes of any kind. I first shipped these grapes in 1898 and 1899. I sent a

sample, and wrote on it 'Lady Fingers,' to my agent in the east, asking for an opinion; and from that time on I used a stamp and stamped them 'Lady Fingers.' I got them in increased quantities from then on every year. I have continued to ship these grapes since that time and I always employed the name 'Lady Fingers' in connection therewith."

Mr. Humphrey testified (R. 36):

"I advertise the 'Lady Finger' brand of grapes by sending out what we call broadsides to the trade immediately before the season opens, through the east to the dealers, to the auction buyers, to the large chain stores, to the wholesale dealers and jobbers in the auction markets in the east."

As showing that the adoption of this mark by Mr. Humphrey was not the appropriation of any commercial name or a name then in use for grapes Mr. Humphrey testified (R. 37-38):

"I don't know by what name the grape was known when I first started the production of these grapes. If it had a name I had never seen it myself. I identified it as about one of 60 varieties of grapes that I had gathered up in an experimental way, seeking to find some new variety of grape with merit. I am not quite sure whether I obtained the vines or cuttings from which I produced the particular grape from the Department of Agriculture in Washington or whether it came from the University of California. It came, I think, from one of those two sources.

It is contended that this grape is a Persian variety. That I have learned since this controversy arose. The grapes are shipped in carloads to Chicago, New York and other auction markets and sold at auction; or, in some cases, they are

shipped to jobbers who represent me and sell them out to the dealers in small quantities."

As showing the influence of imagination in suggesting a striking trademark for an article, it may be pointed out that at the same time that Mr. Humphrey adopted the name "Lady Fingers" for a certain variety of grapes, he also adopted the name "Baby Toes" for another because of its peculiarly suggestive shape (R. 67-68):

"Mr. CONLEY. Q. Do you ship any under the name 'Baby Toes'?

A. Yes.

XQ. For how many years have you done that?

A. Ever since I have been producing them.

XQ. They are not listed in the Standardization Act, are they?

A. I don't think so. Nobody raises them.

XQ. What is the real name of that variety?

A. I can't say."

* * * * *

"XQ. Why don't you try to market more 'Baby Toes'?

A. They haven't got the outstanding appearances of the grape, such as the one I discovered that is named 'Lady Fingers.' There are other grapes that are almost the same and just as good, and I never had any reason to believe that they had merits sufficient to justify propagating them like I do 'Lady Fingers.' "

This popularity of "Lady Fingers" shows a reason for defendants' infringement. It is a good seller under a good name and hence the inducement to infringe is the greater.

INFRINGEMENT OF DEFENDANT OF RECENT ORIGIN.

For twenty-five years or more plaintiff continued to build up its business under this trademark without any molestation from any source, and it was not until about 1920 that Mr. Humphrey ever heard of anyone employing the name "Lady Fingers" on or in connection with grapes. (R. 39.)

Speaking of the years 1920-1924, Mr. Humphrey testified (R. 39):

"Prior to that time I never heard of anyone other than myself using this name 'Lady Fingers' on or in connection with grapes. *I first heard of the use of the name 'Lady Fingers' by the defendants Ben H. Arkelian and Ben H. Arkelian & Company within the last three years. Upon hearing that, I notified Ben H. Arkelian by letter that I had a United States Government trade-mark and asked him to cease using the name 'Lady Fingers' in connection with grapes. At that time he was shipping carloads; in one case that I recall, to Chicago and to Pittsburgh, and to the northwest—Portland.*"

INJURY BY VIRTUE OF THE INFRINGEMENT.

Mr. Humphrey testified (R. 40):

"After these larger shipments of 'Lady Finger' grapes by the defendant I noted a change in my business. In one case I had made a sale of five cars, I recall, to a cash buyer, and he had expected to handle them exclusively in the market, and he notified me before the first car came in that defendant was quoting a car through his agent in the market which would arrive the same day or possibly the day before, priced on arrival, which is a common practice in the trade. My representative in that market notified me that as

far as they could find out the price would be about 25 cents less per package than they had paid me, and they asked me what to do in the premises and protested; and the outcome of that was that I was compelled finally to make them a concession of 25 cents a package on the five cars."

The loss to plaintiff, occasioned by this one transaction of defendant's interference, amounted to as much as \$250.00 per carload. (R. 65.)

**PLAINTIFF HAS ALWAYS JEALOUSLY GUARDED
ITS TRADEMARK RIGHTS.**

Continuing, Mr. Humphrey testified (R. 40-41):

"Aside from my own company and the defendant here, there are a *number of other concerns producing a similar appearing grape*—in fact, all of the large companies have to ship similar grapes, and, as far as I know, the same grape, *and I have notified them, where I find it out in every case, to cease using the name, and in every case they have ceased using the name.* They call them, in some cases I know of, 'Rish Baba.'"

* * * * * *

Plaintiff had a perfect right of course to sell or give away cuttings, so long as plaintiff did not part with title to the name of the fruit grown from these vines. In other words, while anyone could grow fruit from these cuttings, they could not call the fruit so grown therefrom by the name of "Lady Fingers." Mr. Humphrey shows beyond question that in all cases where he gave away cuttings he made it clear that he neither gave nor transferred any right to the use of the words "Lady Fingers." In other words, the

same product would be marketed by another grower under another name.

This is exactly what takes place in the fruit canning industry where different canners buy, for example, the same variety of peaches and put them up under their particular house brands or the brands of their customers; or growers buy nursery stock of a particular variety from the nurserymen and sell the grown fruit under the grower's particular names.

**PLAINTIFF'S VIGILANCE IN ASSERTING HIS RIGHTS AND
PUBLIC ACQUIESCENCE IN PLAINTIFF'S EXCLUSIVE
RIGHTS.**

Mr. Humphrey testified (R. 51):

“On an average of from three to six people each year have written me asking for cuttings of the so-called ‘Lady Finger’ vines, and I have given two cuttings to anyone who asked for them. *They were notified that they could not call them ‘Lady Fingers.’*”

(R. 53-54):

“Q. Are you the only producer of this variety of grape in the Sacramento Valley, ‘Lady Finger’ grapes?”

A. As far as I know.”

* * * * *

“A. I have been told that in the last few years, since this came up, that there are people who are raising and shipping ‘Lady Finger’ grapes to some extent up in Kern County.

“I have been on the Arkelian place. I did not know he was raising these grapes, except from hearsay. His man showed me the grapes, the vines; they were too young, though, for me to know what they were; but his exact words were,

‘This is the so-called Lady Finger.’ I couldn’t tell by looking at them whether there were any grapes on the vine or not. I didn’t know whether he had authority to say what he was saying. He was a hired man and there was nobody else on the ranch. That was within the last four or five years.”

Concerning a recent State of California publication of the Horticultural Department, Mr. Humphrey testified on cross-examination (R. 58):

“XQ. I will ask you if you have ever seen this work at all? (Handing document to witness.)

A. I have only seen this in the last 18 months.

XQ. Yes. And you will notice that the name ‘Lady Finger’ appears there under the table varieties of grapes?

A. Yes. *And I protested to Mr. Hecke putting that name in there, told him he didn’t have any right to do that, and he said, ‘I didn’t know you had a trade-mark. We will take it out.’ He said that.”*

And at R. 62-63:

“Now, I believe you said that nearly everybody has ceased using the name ‘Lady Fingers’ in the state,—shippers of grapes?

A. Where I have notified them, they have.

XQ. Who have you notified?

A. The Earl Fruit Company and the California Fruit Exchange, who shipped about 12,000 cars, I think, a year. *They have notified their representatives and have notified their growers to market the grapes under a name other than ‘Lady Fingers.’ ”*

* * * * *

“XQ. You never knew anybody in the San Joaquin Valley who changed the name since you made your protest?

A. I have been investigating the matter and I find that the order went out as a general order.

Q. From whom?

A. From the head offices of the Earl Fruit Company and the California Fruit Exchange and I can't recall right now—"

* * * * *

On cross-examination Mr. Humphrey testified (R. 42-43):

"When I received these cuttings *I discarded the names in this particular lot, as I remember it, because they were so unpronounceable that I couldn't remember them*, and I put numbers on them,—1 to 10 on the first shipment, and the second year, from 1 to 20; and I copied the names in a book and I kept it for years; but my house burned up and the book was destroyed. I never used the names. I don't remember the particular name that was on the cutting of this particular grape. I am certain that the name 'Lady Finger' never appeared on those cuttings. *I never had heard of the name 'Lady Finger' before that.*"

* * * * *

"A. I had never heard of a grape named 'Lady Finger.' "

* * * * *

"We wrote the Earl Fruit Company protesting against the use of the name 'Lady Finger' and after one or two exchanges of letters they issued the order."

* * * * *

"Q. Well, you don't know anything about it, whether they issued an order or not, do you?

A. *Except that the growers quit using the name 'Lady Fingers.'*

Q. What growers quit?

A. Specifically, I can't say. A man by the name of Humphrey, for one, who happens to be a neighbor of mine, but not a relative of mine, however; a man by the name of Winkelman, who shipped with the Earl Fruit Company."

And on rebuttal (R. 133) Mr. Humphrey testified:

“A. *Nobody has ever used that name ‘Lady Fingers’ except two people and they have a special license from me, ‘Shipped under the supervision of A. B. Humphrey Company’; and then they bring the fruit and put it in my cars, I put that on. If they pick the fruit and take it to somebody else’s packing-house, they have to put some other name on there, and they understand that.*”

Mr. Humphrey is corroborated by Geo. Winkelman (R. 70), a fruit grower and man of standing in his community:

“The COURT. That he will testify he is a neighbor of Mr. Humphrey, and I suppose he is the man that has been given cuttings of these so-called ‘Lady Finger’ grapes and counsel now adds to what I stated, that he markets his grapes as ‘Rish Baba’ grapes and that he sells those grapes through the plaintiff.”

On cross-examination Mr. Winkelman testified (R. 71-72):

“As near as I can recall, I first observed these ‘Lady Finger’ grapes out at Mr. Humphrey’s place, the second year after it was grafted. It was grafted in the spring of ’94 and I saw the bunch of grapes in ’95.

* * * * *

And my recollection is and I have always understood that Mr. Humphrey called it ‘Lady Fingers’ on account of the shape of the berry.

* * * * *

A. I remember distinctly that the term ‘Lady Finger’ applied to the shape of the berry. That is my recollection.”

And on redirect (R. 73):

“The shipments I make of ‘Lady Finger’ grapes is now done under license of Mr. Hum-

phrey. Mr. Humphrey gave me a stamp last year to mark the boxes with. I think it says, 'Packed under supervision of A. B. Humphrey Company.' They are shipped in Mr. Humphrey's cars. When I make shipments through the Earl Fruit Company, I stamp the boxes 'Rish Baba.' As near as I remember, Mr. Humphrey made his first shipments about 1898 or '99. I worked for Mr. Humphrey for 31 years.

* * * * *

We never shipped any as 'Lady Finger' grapes except through Mr. Humphrey."

* * * * *

"It is not important that the plaintiff does not himself manufacture the articles which he sells and upon which he places his trademark. It is sufficient that the goods are manufactured for him, and that he owns or controls the goods which he offers for sale, and upon which he places his trademark or trade-name. *McLean v. Fleming*, 96 U. S. 245, 253, 24 L. Ed. 828; *C. A. Briggs Co. v. National Wafer Co.*, 215 Mass. 100, 104, 102 N. E. 87, Ann. Cas. 1914C, 926."

(*Charles Broadway Rouss, Inc. v. Winchester Co.*, 300 Fed. 706, 722-23.)

DEFENDANTS' SO-CALLED PROOFS.

As against the foregoing proof of adoption and use by plaintiff, and infringement by defendants, the latter's showing by way of confession and avoidance is weak indeed.

Defendants offered (R. 80) a definition of "Lady Fingers" appearing in a 1920 or 1921 edition of Webster's Dictionary as referring to "a variety of grape," without proof of origin or authority for the alleged information. (See the Listerine case, post.)

Next, a nurseries' catalog of 1921 or 1922 is submitted (R. 81) with a fugitive unproven, unauthorized reference to "Lady Finger" grapes. For aught that appears the catalogue may have been referring to plaintiff's trademarked product. Due objection was entered (R. 82) to these publications.

Another reference is made (R. 83) to an unproven publication entitled "California Horticulture" by Geo. C. Roeding whose earliest claimed date is 1909. (R. 83.) Any statement coming as long after plaintiff's adoption of its trademark and *without the authority of plaintiff* of course does not bind the plaintiff.

DEFENDANTS' THEORY OF THE CASE.

Defendants' contention is manifestly this: That "Lady Fingers" is merely a "nickname" for *several different varieties of grapes*. But defendants overlook that a trademark is just that very thing.

"Nicknames are not confined to persons. Goods have nicknames; business houses have them. Oftentimes they are just as valuable as the full name of the goods or the formal name of the house, sometimes more valuable." (*Nims*, Section 56, page 100.)

Defendants do not even claim that the term "Lady Fingers" is merely the name of one particular variety of grapes. With several similar varieties to choose from, substitution is all the easier.

In defendants' brief below, it was said (pages 1-2):

"Defendants contend that a white grape known as 'Lady Finger' or 'Lady Fingers' has been grown and sold in the State of California for

more than forty years. The evidence shows that the name 'Lady Finger' includes a variety of grapes grown here in California, and that that name is given to the *Pizutello di Roma* grape, the *Rish Baba* grape, the *Olivette Blanche* grape, the *Khandahar* grape, the *white Cornichon* grape and several others. These particular names are not known to the people throughout the United States generally, although they appear in various catalogs issued by nurseries throughout the State and are mentioned in the California Fruit and Vegetable Standardization Act.

"It is safe to say that grapes of the Lady Finger variety were grown in Persia, Turkey and Austria long before A. B. Humphrey was born, and that they were given the name or names the translation of which is 'Lady Finger' or 'Lady's Finger.' "

That "Lady Finger" is not the scientific or viticultural name for these grapes is evident from a variety of sources. Prof. Bioletti, of the State University, claims that the grape to which plaintiff has applied the trademark "Lady Fingers" is known in this country and abroad as the "Rish Baba." (R. 60-1,76.)

Other grapes of a similar appearance were known to plaintiff but none were ever designated as "Lady Fingers" prior to plaintiff's adoption of the name.

Mr. Humphrey was asked (R. 143):

"MR. CONLEY. Q. You have told the Court now, as I understand it, that the name 'Lady Finger' is applied to 'Rish Babas,' 'Pizzutello di Roma' and 'Olivette Blanche'?"

A. I said in my experience I have known it to be."

That shows the very essence of true trademark existence; i. e. a specific mark for a general class of goods!

“LADY FINGERS” A TERM DESIGNATING ORIGIN
WITH PLAINTIFF.

Mr. Humphrey testified on cross-examination (R. 50):

“The COURT. Q. Did they say that there were other brands of ‘Lady Fingers’ in the market?

A. Yes, and that the party was deceived because they couldn’t distinguish them without eating them.

Mr. CONLEY. Q. Were they the same variety of grapes?

A. In a great many cases they were not.

XQ. How do you know?

A. They were sent to me with the original boxes,—bought and sent to me and they carried the word ‘Lady Fingers’ and *they proved to be a different variety of grape from any other grape*,—either Rish Baba or from my kind of grapes or any other grapes that I know of.”

Defendants are, and always have been, at Liberty to mark their grapes with the name “Rish Baba,” or any of the other appropriate names open to them, and which marking would be in full compliance with State requirements.

Obviously, defendants’ only purpose in insisting upon a right to mark their grapes with the name “Lady Fingers” is to take advantage of plaintiff’s good-will and advertising. It is inconceivable that these defendants would go to great expense and trouble in litigating this question if, as they assert, their goods are intended to be sold solely as “Enchantress” grapes, and not as “Lady Finger” grapes.

THE CELLULOID CASE.

In upholding the trademark "Celluloid," after it had become the designation by common usage of the substance now known as "Celluloid," Mr. Justice Bradley said (page 98):

"Secondly. As to the complainant's alleged right to the exclusive use of the word 'celluloid' as a trade-mark, and the defendant's alleged imitation thereof. On this branch of the case, the defendant strenuously contends that the word 'celluloid' is a word of common use as an appellative, to designate the substance celluloid, and cannot, therefore, be a trade-mark; and, secondly, if it is a trade-mark the defendant does not infringe it by the use of the word 'cellonite.'

As to the first point, it is undoubtedly true, as a general rule, that a word merely descriptive of the article to which it is applied cannot be used as a trade-mark. Everybody has a right to use the common appellatives of the language, and to apply them to the things denoted by them. A dealer in flour cannot adopt the word 'flour' as his trade-mark, and prevent others from applying it to their packages of flour. I am satisfied from the evidence adduced before me that the word 'celluloid' has become the most commonly used name of the substance which both parties manufacture, and, if the rule referred to were of universal application, the position of the defendant would be unassailable. But the special case before me is this: The complainant's assignors, the Hyatts, coined and adopted the word when it was unknown, and made it their trade-mark, and the complainant is assignee of all the rights of the Hyatts. When the word was coined and adopted, it was clearly a good trade-mark. The question is whether the subsequent use of it by the public, as a common appellative of the substance manufactured, can take away the complainant's right."

THE "COTTOLENE" CASE.

N. K. Fairbank Co. v. Central Lard Co., 64 Fed. 133.

"Cottolene" as a substitute for lard was sustained as a valid trademark and held infringed despite the fact that subsequent to adoption, the public had come to use it to denote the particular article; the Court saying (page 136):

"It is well settled that the inventor of an arbitrary or fanciful name may apply it to an article manufactured by him to distinguish his manufacture from that of others, and that the subsequent use of such word by the public to denote the article does not deprive the originator of such word of his exclusive right to its use. *Selchow v. Baker*, 93 N. Y. 59; *Ausable Horse-Nail Co. v. Essex Horse-Nail Co.*, 32 Fed. 94; *Manufacturing Co. v. Read*, 47 Fed. 712. Neither does the fact that the defendant sold under its own name, and made no attempt, other than by the use of the word 'Cottoleo,' to palm off his goods as those of the complainant, constitute a defense. *Roberts v. Sheldon*, 18 O. G. 1277, Fed. Cas. No. 11,916, and cases there quoted; *Sawyer v. Horn*, 1 Fed. 24; *Hier v. Abrahams*, 82 N. Y. 519; *Battle v. Finlay*, 45 Fed. 796. It seems to be the law that, when manufacturers have educated the public to ask for a certain article by its trade-mark name, they have acquired the right to insist that products manufactured by others shall not be given to the public under that name."

This word was again sustained as a valid trademark in *N. K. Fairbank Co. v. Ogden Packing & Provision Co.*, 220 Fed. 1002.

THE "SAPOLIO" CASE.

Enoch Morgan's Sons Co. v. Ward, 152 Fed. 690 (7 C. C. A.).

The word "Sapolio" was adopted as a trademark as far back as 1869 and registered many years later as a trademark, yet as late as 1907, the date of the decision above, was found to be a perfectly good trademark although probably there has been no better known household article, and that there is not one user in a hundred who knows that there is only one genuine "Sapolio."

Enoch Morgan's Sons Co. v. Whittier-Coburn Co., 118 Fed. 657 (C. C. N. D. Cal.).

Judge Morrow in the above case held that "Sapolio" was a valid trademark and infringed by defendant.

THE "LISTERINE" CASE.

Lambert Pharmacal Co. v. Kalish Pharmacy, 219 Fed. 323.

The trademark "Listerine" was held valid and infringed although prior to registration it had gained a place in the dictionary as meaning the particular article.

THE "CASCARETS" CASE.

Sterling Remedy Co. v. Gorey, 110 Fed. 272.

"Cascarets" was applied to a laxative remedy for a drug called in Spanish "cascara sagrada" meaning "bitter bark." The trademark was upheld as a valid

trademark, despite the suggestiveness of the product and the descriptive use by the public.

The word "Chartreuse" although used descriptively for hundreds of years abroad was upheld by the Supreme Court as a valid trademark. (*Baglin v. Cusenier Co.*, 221 U. S. 580; 55 L. Ed. 863.)

"Chartreuse" was not only the name that the public knew the drink by, but the word was geographical. It was a good trademark, however, because it referred exclusively to a product of the plaintiff.

It was very early recognized in the law of unfair competition and trademark infringement that the probability of misleading, not experts or persons who knew the real facts, but ordinary or unwary customers, is the mischief to be guarded against.

Nims, in quoting early English cases, says (page 20):

"The multitudes of ignorant and unwary must be regarded in considering the interest of traders who may be injured by the mistakes of purchasers. The plaintiff has a right whether founded on property in himself, or upon reasons of public policy which make it incumbent upon the courts to protect the public from deceit, to insist that his rival sell his goods in such a way as to insure the purchasers of them from deceit."

ALLEGED PRIOR USES.

The prior uses within the United States pleaded, and repeated in the answers to interrogatories filed by defendant Ben Arkelian, have in no wise been proven. Even if these alleged uses of the term "Lady

Fingers” by others than defendants actually occurred at the time claimed or even with the consent of the plaintiff, that would be no defense or excuse for defendants’ infringement. (*Hub Clothing Co. v. Cohen*, 113 At. 677 (Sup. Ct. Pa. 1921).

In this connection plaintiff did everything possible in advance of trial to get defendants to commit themselves to a valid defense, and to that end filed interrogatories which were answered by defendant Ben Arkelian. (R. 12-15.)

These prior uses centered around the Eiseman Vineyards near Fresno; and plaintiff proved that no such grapes, nor, indeed, any grapes known as “Lady Finger” grapes, were ever produced on this vineyard during the many years that Mr. Baber was in charge.

The oral and uncorroborated testimony of K. Arkelian is that he knew of an elongated grape in Turkey and had heard the name “Hanan Parmaghy” applied thereto. Certainly that is not sufficient to overcome a vested right. Moreover, if this alleged Turkish name were a common appellation for a grape and meant “Lady Fingers,” as the witness says, it would most likely have found its way into Turkish publications; but none such have been offered.

The same observations apply to the witness Cosulich and his story about the alleged Dalmatian words “Gospodje Peret.”

This kind of testimony is considerably weakened by the offer of plaintiff to prove that the particular grape in question is of Persian origin and known in

its native country as "Rish Baba," meaning "Father's Beard." This proof was not presented, owing to defendants' agreement to stipulate the same.

Obviously, if the testimony of K. Arkelian or Mark Cosulich can be considered sufficient to destroy valuable vested trademark rights, then any trade mark of any character can be defeated and a plaintiff is put in a position where it cannot offer rebuttal proof on the simple say-so of a reckless witness. Note that neither witness testifies that the names "Hanan Parmaghy" or "Gospodje Peret" are to be found in any publication on viticulture, either in Turkey or Dalmatia; but they merely state, without corroboration, that they have heard that name applied to a grape. Obviously, such testimony need not, even if it could, be rebutted. Hearsay and uncorroborated oral testimony as to prior uses in a foreign country, would not overcome plaintiff's *prima facie* rights arising through registration.

"Section 51. UNFAMILIAR OR SCIENTIFIC WORDS USED AS NAMES OF GOODS. A name taken from a foreign language, may be descriptive to a person who is an expert linguist, or if the name be made up from chemical or other scientific terms, to one who is a trained scientist. To the public, such words are usually unintelligible and entirely non-descriptive, and appear to be artificial words. For instance, the names 'Pepto-Mangan' and 'Pepto-Manganate of Iron and Cascara' would not convey very different impressions to an unlearned man, while to a chemist they might convey very different meanings. On that ground they have been held arbitrary and fanciful names." Citing *M. J. Breitenbach Co. v. Spangenberg*, 131 Fed. 160. (*Nims*, Second Edition, Section 51, page 90.)

BURDEN OF PROOF HEAVY ON DEFENDANT.

There is no reason in principle or justice why less stringent rules should be applied against a defendant trying to destroy a trademark and particularly a registered trademark, than applies to the case of prior use advanced in patent cases. The rule in such cases is well known to this Court.

But the same rule does apply in trademark cases as indicated by the Supreme Court in *Bourjois v. Katsel*, 260 U. S. 689, said:

“The monopoly in that case (i. e., a patent) is more extensive, but we see no sufficient reason for holding that the monopoly of a trademark, so far as it goes, is less complete. It deals with a delicate matter that may be of great value, but that easily is destroyed, and therefore should be protected with corresponding care.” (Page 466, 67 L. Ed.)

Further than that no authority can be found that even if the testimony of K. Arkelian or Mark Cosulich had established the fact that the names “Hanan Parmaghy” or “Gospodje Perst” had been applied to grapes in Turkey or Dalmatia prior to plaintiff’s first adoption and use of the name “Lady Fingers” in the United States, then such would constitute a defense to an action of this kind.

The testimony of the defendants’ witnesses can be mildly characterized as unreliable, particularly where it is shown in the one concrete instance that plaintiff could lay its hands on of alleged prior use, to wit, the Eiseman Ranch, that the facts were not as stated by the defendants’ witnesses.

Whether this is a case to apply the maxim: "*Falsus in uno falsus in omnibus*," is for the Court to determine.

FOREIGN USE, EVEN IF PROVEN, NOT A BAR TO A VALID UNITED STATES TRADEMARK. (Gorham Mfg. Co. v. Weintraub, 196 Fed. 957, 961.)

"It has several times been held by the federal courts that a trade-mark used abroad may be adopted by one in this country in connection with a similar article provided its adoption was in good faith. Richter v. Anchor Remedy Co. (C. C.) 52 Fed. 455. And though British hall-marks are not strictly trade-marks, this rule is thought analogous."

Continuing the subject, the Court said (page 963):

"If this were an action by a British subject to enjoin infringement of the Birmingham hall-mark complaining that his property rights had been invaded, and it was shown that hall-marked silver ware had previously been imported into the United States, a different question would be presented for decision. And even in that case something more would be required to establish such right than an importation 'to a limited extent upon special orders, to supply particular customers.' Richter v. Anchor Remedy Co., supra; Kohler Mfg. Co. v. Beshore (C. C.) 53 Fed. 262; MacMahan Pharmacal Co. v. Denver Chemical Mfg. Co., 113 Fed. 468, 51 C. C. A. 302; Tetlow v. Tappan (C. C.) 85 Fed. 774. But in a litigation between citizens of this country it is to me perfectly plain that one cannot be permitted to infringe upon the prior rights of the other in a trade-mark by the use of which the latter has built up an extensive trade in a particular commodity."

Another leading case on the subject is the Perfume case (*Le Blume Import Co. v. Coty*, 293 Fed. 344 (2 C. C. A.)) where the Court said (page 350):

“The record discloses that for over 100 years a perfume called ‘Origan’ has been manufactured or produced in Paris by the house of Renan, which still exists and is engaged in carrying on the business; and it also appears that many perfumers in Paris are at this time manufacturing a perfume called ‘Origan,’ but it is not disclosed, except in the case of Renan, when they commenced the manufacture of ‘Origan,’ whether before or after Coty put his perfume on the market. And in France these manufacturers of perfume invariably put their name after the name of the perfume, as ‘Origan-LaFleur.’ But the right of Coty to protect his trade-mark ‘Lorigan’ or his right to use ‘L’Origan’ upon his perfumes in the United States is not dependent upon whether he has any exclusive right to the trade-mark or to the trade-name in France. It cannot be denied that the protection of a trade-mark in the United States is not to be defeated by showing a prior use of a like trade-mark in France, or in some other foreign country. It is not essential that one who claims protection of his trade-mark should in all cases be able to show that he first used it. The prior use of a mark by another in some foreign country is not fatal, if the one claiming protection is able to show that he was first to use it in this country. *Gorham Mfg. Co. v. Weintraub* (D. C.), 196 Fed. 957; *Walter Baker & Co. v. Delapenha* (C. C.), 160 Fed. 746; *Richter v. Reynolds*, 59 Fed. 577, 579, 8 C. C. A. 220; *Richter v. Anchor Remedy Co.* (C. C.) 52 Fed. 455, 458.”

The Court then goes on to show that the reason for this is based on the “territorial limitations” of trademarks, saying (pages 350-351):

“It may be true that a trader can protect his trade-mark in all the markets in which he sells without respect to territorial limits, but it is not true that one who has acquired a technical trade-mark and used it in a limited territory thereby acquires a prior right to its use in an entirely different territory. Thus in *Hanover Milling Co. v. Metcalf*, 240 U. S. 403, 415, 36 Sup. Ct. 357, 361 (60 L. Ed. 713) the Supreme Court said:

“ ‘In the ordinary case of parties competing under the same mark in the same market, it is correct to say that prior appropriation settles the question. But where two parties independently are employing the same mark upon goods of the same class, but in separate markets wholly remote the one from the other, the question of prior appropriation is legally insignificant, unless at least it appear that the second adopter has selected the mark with some design inimical to the interests of the first user, such as to take the benefit of the reputation of his goods, to forestall the extension of his trade, or the like.’

“And this doctrine was adhered to in *United Drug Co. v. Rectanus Co.*, 248 U. S. 90, 39 Sup. Ct. 48, 63 L. Ed. 141. This is not a suit by a French manufacturer, who claims that because of previous sales under his French trade-mark, which he had made in the United States, he had acquired rights which made it unlawful for Coty to register here the same trade-mark. It may be quite true that prior to Coty’s registration of his trade-mark in the United States there may have been some casual importations to a limited extent of perfumes from abroad, but these occasional importations were so infrequent and inconsequential that it cannot be said that the producer of the goods had obtained a market for them here which entitled his trade-mark to protection.

“A casual sale or a casual importation does not establish or create a market, within the rule that

a trader can protect his trade-mark or trade-name in the markets in which he sells, and prevent another trader from adopting the same trade-mark or trade-name in that territory. *Menendez v. Holt*, 128 U. S. 514, 521, 9 Sup. Ct. 143, 32 L. Ed. 526; *Richter v. Anchor Remedy Co.* (C. C.) 52 Fed. 455, 456; *Kohler v. Beeshore*, 59 Fed. 572, 576, 8 C. C. A. 215. In *Eiseman v. Schiffer* (C. C.) 157 Fed. 473, the court sustained the validity of 'radium' as a trade-mark for silk goods, although it appeared that the word first came into use in Paris in connection with peculiarly lustrous fabrics, and was then taken up by many persons in this country for use in the same connection. That circumstance, the court declared, was immaterial, because the evidence showed that the party registering the word here was the first to use it in this country. See *J. & P. Baltz Brewing Co. v. Kaiserbrauerei, Beck & Co.*, 74 Fed. 222, 20 C. C. A. 402; *Gorham v. Weintraub* (C. C.) 176 Fed. 927. And we have no doubt upon the evidence in this record that Coty was the first in the markets of the United States to use the words 'L'Origan' in connection with perfumes, with the possible exception of a few importations which were so casual that they may be ignored."

EISEMAN VINEYARD ALLEGED USE TOTALLY DISCREDITED.

An effort was made on cross-examination of Mr. Humphrey to show that the words "Lady Fingers" had been used on a grape in connection with the vineyard known as the Eiseman Ranch. In regard to any alleged use there, Mr. Humphrey unqualifiedly testified (R. 44):

"I have been on the Eiseman vineyard, but I never saw any 'Lady Fingers.' I went over that vineyard on one occasion with Mr. Rennie, a well-

known vineyardist in Fresno, but I never saw a 'Lady Finger' grape or heard of a 'Lady Finger' grape being grown there."

The testimony of the defendant Ben Arkelian as to any alleged prior use of the words "Lady Fingers" on the Eiseman Ranch, and prior to 1895, or at any other time is not only unsatisfactory in quality but must be received with a good deal of caution. All he says on the subject is this (R. 106-107):

"I know the 'Lady Finger' grape. I have been growing that grape since 1920. Prior to that time I never made any sales of 'Lady Finger' grapes. I have about 110 acres of 'Lady Finger' grapes growing. Prior to the institution of this suit, I never heard that particular variety of grapes called by any other name than 'Lady Finger.' I first saw this variety of grape in my boyhood days when I was approximately 10 years of age. That was on the Eiseman Vineyard. At that time my father told me the name of the variety of grapes. He gave me the translation of the Turkish or Armenian word meaning 'Lady Finger.' I made a shipment of grapes to Portland, as testified to by Mr. Humphrey."

On cross-examination Arkelian admits (R. 106) that his father was not connected with the Eiseman Ranch and that *it was not until the year 1916 that he saw the name "Lady Fingers" on boxes of grapes, and he says that the first he ever heard of "Lady Finger" grapes grown by Mr. Humphrey was in 1919.* But we may well doubt that because he probably knew of it long before then. In any event if he heard of it in 1919, it did not take him long to start in imitating the name. Arkelian, however, does not find corroboration even by his own witnesses as to the use of the term

“Lady Fingers” even as a term of description on the Eiseman Ranch, because his brother, going by the name of Joseph Arkell testified (R. 103):

“I have been on the Eiseman Vineyard. I haven’t any recollection that there were ‘Lady Finger’ grapes being grown there; bu I know they were grown on the Margarita Vineyard.”

This last minute shift of defense from the Eiseman Vineyard to the Margarita Vineyard must likewise be accepted with a great deal of caution, particularly when Ben Arkelian is not only contradicted by his brother but by Mr. Edward I. Baber, a venerable and respected witness, who was on the Eiseman Ranch from the year 1880 to about 1916 or 1917 as manager. (R. 112.)

He testified (R. 112):

“Q. Did you ever know, during that period, of any grape being grown there on that ranch or vineyard and which was sold under the name of ‘Lady Finger’?”

A. Sold or marked ‘Lady Finger’?

A. **We never had such a grape. The vineyard never had such a grape; not under that name.”**

Mr. S. A. Lines, another highly respected citizen, fruit shipper and vineyardist who had been connected with the Earl Fruit Co. since 1902 or 1903 testified (R. 122):

“I am familiar with Eiseman ranch, near Fresno. I was manager of the Earl Fruit Company,—I was local agent in Fresno for the Earl Fruit Company about 1902 or ’03 and the Earl Fruit Company handled all the table grapes from the Eiseman Vineyard from that time until it was sold. I have been over that property many times.

In that connection I never saw or heard of any grapes called 'Lady Fingers' being grown there. I am familiar with the eastline portion that has been referred to here. I knew of no grapes grown on that portion or on the Eiseman Vineyard called or marked 'Lady Fingers.' I think I first became acquainted with the words 'Lady Fingers' when Mr. Humphrey made his plantings at Escalon. That must have been about 1912 or '13, during 1914, possibly; along in there. I am acquainted with the other vineyard that has been referred to here, the Margarita Vineyard. I have probably been over that property also, but not often; very seldom. I never heard of any 'Lady Finger' grapes being grown on the Margarita Vineyard."

THE "ANTIPHLOGISTINE" CASE.

Even if there had been some casual use of the word "Lady Fingers" by the few people and in the manner testified to on behalf of this defendant, it would not alter the plaintiff's rights one whit. Suppose any one of these earlier alleged users of the word "Lady Fingers" pretended to by defendant claimed that he was the inventor of the word "Lady Fingers" (a preposterous assumption) and were to bring suit, we would have a case closely approximating and met by *Macmahan Pharmacal Co. v. Denver Chemical Mfg. Co.*, 113 Fed. 468 (8 C. C. A.), concerning the trademark "Antiphlogistine."

The term "Antiphlogistine" is a trademark that was adopted by the defendant, Denver Chemical Mfg. Co., and applied to a natural medicinal product sometimes called "Denver Mud." The plaintiff there claimed they had adopted it earlier and used it in

New York in a small way. In disproving of the plaintiff's claims the Court said (pages 473-474):

“The pharmacists did not recognize the word ‘Antiphlogistine’ as complainant’s brand. Not only so, but the limited sales of the preparation by any name indicate an unfamiliarity with it certainly as ‘Antiphlogistine.’ Ninety-eight different persons only inquired for it during the decade following the supposed adoption of the trademark in question, and the aggregate amount paid by them for all the purchases made amounted to the sum of \$514.18 only. There is no evidence in the record showing that complainant’s preparation was kept in drug stores generally for sale. On the contrary, the only fair inference from all the evidence is that it was manufactured in very small quantities, kept for sale exclusively by complainant, advertised little if any, sold infrequently and in small quantities, and most generally to dentists located in near proximity to complainant’s drug store, unknown to the trade generally by any name, and when known in the region where sold it was not known as ‘Antiphlogistine’ but ‘Macmahan’s Antiphlogistine.’ Such being the evidence, we are of opinion that complainant’s mixture had obtained no such acceptance or reputation in the trade under the name ‘Antiphlogistine’ as to confer upon complainant a right of property in that word alone. The test laid down by the supreme court, in cases *supra*, is not met. The use was not sufficient to ripen into a right of property. The mark ‘Antiphlogistine’ on any package would not have been recognized by the trade as evidence of its origin, or as an indication of complainant’s ownership. It follows that defendant’s large and prosperous business, innocently and at great expense organized and developed by the use of this same word under the circumstances shown by the proof, cannot be destroyed on complainant’s claim of a superior right thereto.”

So much for the domestic alleged prior uses on the Eiseman and Margarita vineyards.

NO LACHES BY PLAINTIFF.

It is assumed that the defense of laches is based either upon the fact that after defendants were notified by plaintiff, the latter waited two or three years before beginning suit; or that there had been other sporadic infringements by parties unknown and other than defendants dating back possibly to 1916 or 1917. Of course, the appearance of the name "Lady Finger" in a publication like Webster's Dictionary in 1921 or in a legislative enactment is not an infringement *per se* and has no bearing on the question of plaintiff's laches, particularly where plaintiff had no notice of the same prior to the suit.

"To be sure, it was the duty of the appellee to enforce such right against those whom it knew, or of whom it had notice, were infringing. It cannot be chargeable with laches for failure to prosecute an infringement before it knows or has such notice as would lead an ordinarily prudent person to inquire and learn the existence of the infringement. *Kilbourn v. Sunderland*, 130 U. S. 505. 9 Sup. Ct. 594, 32 L. Ed. 1005." (*Wallace & Co. v. Repetti, Inc.*, 266 Fed. 307, 310.)

It is also important to observe in this connection that defendants have not been misled in any way by plaintiff's delay in instituting suit; nor have the defendants invested large sums of money in labels, advertising and good-will.

Plaintiff not only was always vigilant in asserting its rights but reasonably diligent in bringing suit

when plaintiff saw that defendants had no intention of heeding the warning.

Great latitude is allowed by the Courts in regard to trademarks, although there has been no delay here by plaintiff in bringing suit that bears even a semblance to laches. *Delay in bringing a suit in trademark cases is generally construed as a license terminable at will.*

The subject is ably discussed in the *Hunyadi* case (*Savlehner v. Eisner & Mendelson Co.*, 179 U. S. 19; 45 L. Ed. 60) where the Court said (p. 76):

“As applicable to trade-marks, two cases in this court are illustrative of this principle. In *McLean v. Fleming*, 96 U. S. 245, 24 L. ed. 828, there had been apparently a delay of about twenty years in instituting proceedings, but the court observed that ‘equity courts will not, in general, refuse an injunction on account of delay in seeking relief where the proof of infringement is clear, even though the delay may be such as to preclude the party from any right to an account for past profits.’ An injunction was granted in this case, but it was held that by reason of inexcusable laches, the complainant was not entitled to an account of gains or profits. See also *Harrison v. Taylor*, 11 Jur. N. S. 408. An effort was made in *Memendez v. Holt*, 128 U. S. 514, 32 L. ed. 526, 9 Sup. Ct. Rep. 143, to obtain a consideration of the principle of *McLean v. Fleming*, so far as it was therein held that an injunction might be awarded, though the complainant were precluded by his delay from obtaining an account of gains and profits. But the Chief Justice observed: ‘**The intentional use of another’s trade-mark is a fraud; and when the excuse is that the owner permitted such use, that excuse is disposed of by affirmative action to put a stop to it. Persistence then in the use is not innocent, and the wrong is**

a continuing one, demanding restraint by judicial interposition when properly invoked. Mere delay or acquiescence cannot defeat the remedy by injunction in support of the legal right, unless it has been continued so long and under such circumstances as to defeat the right itself, * * * nor will the issue of an injunction against the infringement of a trade-mark be denied on the ground that mere procrastination in seeking redress for depredations had deprived the true proprietor of his legal right.' (Fullwood v. Fullwood, L. R. 9 Ch. Div. 176.) * * * So far as the act complained of is completed, acquiescence may defeat the remedy on the principle applicable when action is taken on the strength of encouragement to do it, but so far as the act is in progress and lies in the future, the right to the intervention of equity is not generally lost by previous delay, in respect to which the elements of an estoppel could rarely arise."

WILLFUL INFRINGEMENT.

As said by the Court in *Wallace & Co. v. Repetti, Inc.*, 266 Fed. 307, 310:

"The acts of the appellant here were indulged in, not only before, but after, full warning and with knowledge of the appellee's rights and its intentions. The appellant did not at any time modify its business conduct, but continued to infringe; and this was without the acquiescence or consent of the appellee. We think that under these circumstances the appellee was entitled to an accounting. *Garrett & Co. v. Schmidt, etc. Co.* (D. C.) 256 Fed. 943; *Lavton Pure Food Co. v. Church & Dwight Co.*, 182 Fed. 35, 104 C. C. A. 475; 32 L. R. A. (N. S.) 274."

FRAUDULENT INTENT PRESUMED.

“The complainant notified the defendant in writing of his registered trade-mark, and requested it to cease its infringement, and it declined to do so. In suits for infringement of registered trade-marks, where the defendant has refused on notice to cease the use of an infringing device and has continued to infringe, neither a fraudulent intent to injure the complainant nor an actual misleading of the public need to be proved. They will be and are presumed. *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, 548, 549, 11 S. Ct. 396, 34 L. Ed. 997; *Church & Dwight Co. v. Buss* (C. C.) 99 F. 276, 279.”

(*Feil v. American Serum Co.* (C. C. A. 8th Circuit), 16 Fed. (2d) 88, at page 90.)

CONCLUSION.

We submit that the testimony is overwhelmingly in favor of the validity of plaintiff's trademark. That during over 30 years of steadily increasing production and advertising, this mark has come to indicate that grapes sold under the trademark “Lady Fingers” originate with the plaintiff and that defendants' unscrupulous adoption of the mark is a fraud on the public as well as upon the plaintiff.

Defendants' theory that because defendants chose to designate several varieties of elongated grapes by the term “Lady Fingers,” instead of detracting from plaintiff's right is, in fact, a tribute to plaintiff's originality, advertising and success. Defendants are free to ship their elongated grapes which may or may not resemble in appearance the “Lady Finger” grapes

of plaintiff under the term "Enchantress," if they want to use a trademark; or under the scientific names of "Rish Baba," "Cornichon," etc. Plaintiff does object to the use of the mark "Lady Fingers" as applied to any grapes whatever, whether better or worse than those grown or shipped by plaintiff, that do not originate with plaintiff.

Plaintiff has, during a long course of honorable dealing with the public and at great expense, built up a trade in "Lady Fingers" which represents to plaintiff a valuable asset and the defendants ought not by continued infringement be allowed to destroy this property right.

We submit that the decree should be reversed with costs to appellant and an order for an injunction and an accounting entered, together with an order for the surrender and destruction of all infringing marks, labels, wrappers, receptacles, etc., of defendants in accordance with Section 20 of the Trademark Act, *supra*.

Dated, San Francisco,
May 25, 1929.

Respectfully submitted,

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IN THE
United States
Circuit Court of Appeals
FOR THE
Ninth Circuit

A. B. HUMPHREY COM-
PANY, (a corporation),
Appellant,

vs.

BEN H. ARKELIAN and
BEN H. ARKELIAN &
CO., (a copartnership),
Appellees.

In Equity

Claimed Infringement of
United States Registered
Trade-Mark No. 186,739,
July 22, 1924. "Lady
Fingers" for Fresh
Grapes.

Brief for Appellees

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BRIEF FOR APPELLEES

**I. STATEMENT OF FACTS AND GROUNDS
FOR DECREE.**

The statement of facts contained in Brief for Appellant is incomplete and misleading; it sets forth in considerable detail the evidence relied upon by appellant, but does not state fully the conflicting evidence upon which the decree was based. It will therefore be necessary to make herein a brief statement of the facts.

For over forty years a common and well known variety of grapes, known as “Lady Finger” grapes have been grown and produced in the San Joaquin Valley and other sections of the State of California, and have been shipped and sold in the local markets of California and in the markets of eastern states. This variety of grapes is also grown and produced in Europe. The term “Lady Fingers” was applied to these grapes in California as early as the year 1884, and at the present time, and for many years last past, many persons are producing and selling these grapes in the markets of California and of the eastern states. Among the producers and shippers of these grapes are the defendants in this suit.

Lady Finger grapes are long and thin and whitish in color, and quite attractive, and meet with ready sale not only in California but elsewhere. The variety is as well known as many of the other varieties of grapes grown and produced in California; it is a variety or type of grape, in the same sense that Muscats, Malagas, Thompson Seedless, Fresno Beauties, Zinfandels and Missions are varieties or types. Lady Finger grapes are also grown and produced in Turkey and Dalmatia. In Turkey the grape is called “Hanam Parmaghy,” which, translated into the English language, means Lady Finger; and in Dalmatia by the Slovonian-Italian name of “Gospodji Perst,” which in English, means Lady Finger or Lady’s Finger.

Lady Finger grapes was the commonly used name of this particular type of grape long prior to the time when the appellant claims that A. B. Humphrey adopted the name “Lady Finger” as an arbitrary

trade-mark for fresh grapes, and long before the predecessor of this appellant started to grow or produce this variety of grapes in California.

The appellant claims that A. B. Humphrey, its predecessor in interest, produced a variety of grapes which he named "Lady Fingers" as early as the year 1895, and that the said A. B. Humphrey produced and sold these grapes under the name of Lady Finger each year until the year 1927; that on or about the 6th day of September, 1927, the said A. B. Humphrey assigned his interest in the alleged trade-mark to A. B. Humphrey Company, a corporation; that subsequent to this assignment the corporation continued to produce and sell these grapes under the name of Humphrey's Lady Fingers, also. Upon these alleged facts appellant sought an injunction to prevent appellees from selling or offering for sale any of their grapes as "Lady Finger Grapes." The case was tried before Hon. A. F. St. Sure, United States District Judge, in the District Court, and a decree was subsequently entered denying plaintiff any relief whatever and adjudging that the trade-mark claimed by plaintiff and appellant registered in the patent office, and the certificate of registration thereof, were void and of no force or effect.

In its brief, appellant says: "No opinion was rendered so we are left in doubt as to the grounds for the decision." An inspection of the record will at once disclose that there can be *no doubt* as to the reasons for the decision and decree in this case. Indeed, under the evidence adduced at the trial of the case, no other decision or decree was possible. The trial court heard the testi-

mony of the witnesses and had the opportunity to test and determine their credibility and examine the exhibits and other documentary evidence introduced, and after due consideration of all the evidence in the case determined that the contentions of plaintiff and appellant were without merit, and ordered a decree for the defendant. We confidently assert that upon a full consideration of the entire record in the case, the following conclusions must necessarily be reached:

1. That the name “Lady Finger” or “Lady Fingers” is a common and well known name applied to a certain variety of grapes which has been grown in California and shipped and sold for over forty years;

2. That the name “Lady Finger” or “Lady Fingers” as applied to the variety of grapes described in the pleadings is generic, and cannot be appropriated as a trade-mark because it is too general and comprehensive in its meaning to become the monopoly of any single individual in its application to grapes;

3. That long before plaintiff’s predecessor in interest made application to register his trade-mark, Lady Finger grapes were well known to the producers and purchasers of grapes in California and other states, and in Europe, and the term “Lady Fingers” has for many years been the common and commercial name for these white grapes, and that the name was so applied by the producers in the State of California to these grapes with the knowledge, acquiescence and consent of this plaintiff and its predecessor;

4. That plaintiff and its predecessor well knew for many years prior to the institution of this action that

other persons were growing, producing and selling the same variety of grapes that appellant and its predecessor were growing and producing on their vineyards, under the name of Lady Finger grapes, and that appellant and his predecessor permitted, this to be done without making protest or objection of any kind or character to the growers and vendors of said grapes. That under these circumstances plaintiff should not be allowed or permitted, after sleeping on its alleged rights for nearly thirty-three years, to prevent these defendants, as growers and shippers, from disposing of the results of their energy, enterprise and labor and from using the common and well known name by which these grapes are grown, shipped and sold. To grant the relief prayed for would be to give this plaintiff a monopoly in the production and sale of all grapes grown in California of the variety known as Lady Finger grapes;

5. That a decision enjoining defendants from labeling or selling their grapes under the name "Lady Fingers" would probably induce others to attempt to appropriate as trade-marks the names of other well known varieties of grapes on the asserted ground that they were the first to have given the name to varieties that are now well known in this state.

II. THE ISSUANCE OF THE TRADE-MARK DOES NOT PROVE APPELLANT'S RIGHT TO THE EXCLUSIVE USE OF THE WORD "LADY FINGERS."

In order to register a valid trade-mark at Washington, it is, of course, necessary to follow the laws of the United States in this regard. Upon filing the ap-

plication with the Commissioner of Patents and the payment of the fees, the Commissioner causes an examination to be made, and if upon such examination it shall appear that the applicant is entitled to have his trade-mark registered, the Commissioner shall cause the mark to be published at least once in the official gazette of the patent office. (The Code of Laws of the United States of America, Title 15, Chapter 3 of Trade-Marks.)

As a matter of fact the official gazette of the patent office is probably read only by a few patent attorneys in or about Washington, and it is quite likely, in the same circumstances, that, if someone applied for a trade-mark on Mission grapes, or any other variety of grapes grown in the San Joaquin Valley, a certificate of registration of trade-mark would issue. This registration is only *prima facie* evidence of ownership, and is by no means conclusive.

In all probability, the investigation as to the validity of this particular application for trade-mark, was made by someone not familiar with the grape growing industry of this state, because if any particular pains had been taken a reference to *Webster's New International Dictionary and Encyclopedia of the English Language*, published in 1920 by C. & G. Merriam Company, Springfield, Massachusetts, and the numerous publications issued in this country describing the varieties of grapes grown and produced in California, would have disclosed that Lady Finger was the name of a well known variety of grapes grown, produced and shipped from California for sale in the eastern markets, and that the term "Lady Finger" as ap-

plied to grapes was used long before the appellant or A. B. Humphrey, its predecessor, was engaged in the production and sale of grapes,—probably long before A. B. Humphrey was born. There can be no doubt that if a thorough and proper investigation had been made by the Commissioner's office, the application for a registration of the trade-mark would have been denied.

III. APPELLEES WERE NOT GUILTY OF ANY FRAUD OR ANY INTENT TO DECEIVE.

The only question involved in this case is whether or not the appellees are entitled to use the word "Lady Finger" in connection with their advertising and on their Enchantress brand labels. There is no question of any imitation by appellees of appellant's labels, and it is clear that there was no intent whatsoever to deceive the public by the use of the Enchantress brand labels.

The Enchantress brand labels and the Humphrey labels are totally different in size, shape, color and device. During the trial of the action, the Court said:

"I don't see how they would be likely to be deceived by that Enchantress Label. The only issue here is as to the use of the word "Lady Fingers." (R. 48 and 49.)

"Well, the only deception, if any, would be the use of the word "Lady Finger." Wouldn't that be so? There is no similarity whatever between the Enchantress label and the label you use, is there? So that the only deception, if any, would be the use of the word "Lady Finger." (R. 49.)

The labels were introduced in evidence and they speak for themselves. The evidence of the eye is more

persuasive and satisfactory than any other on the question of intent to deceive by the use of labels or brands.

Layton Pure Food Co. v. Church & Dwight Co.,
189 Fed. 24, 34;

The Liggett & Myers Tobacco Co. v. B. Finzer,
128 U. S. 182, 189.

The law affords protection against the unfair competition of any one who seeks by the imitation of label or package or other artifice, to induce persons to deal with him in the belief that they are dealing with another. (*Italian Swiss Colony v. Italian Vineyard Co.*, 158 Colo. 252.) However, in such situation, there must exist the intent to deceive, or at least the doing of acts reasonably calculated to deceive. In the absence of such intent and of such acts, recovery by plaintiff is precluded. In the opinion in *La Republique Francaise v. Saratoga Vichy Springs Co.*, 191 U. S. 427, at page 441, the Supreme Court states:

“It was said by this court in *Delaware & H. Canal Co. v. Clark*, 13 Wall. 322, 20 L. Ed. 883, ‘In all cases where rights to the exclusive use of a trade-mark are invaded, it is invariably held that the essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another, and that it is only when false representation is directly or indirectly made that the party who appeals to the court of equity can have relief.’ Applying this doctrine to the case under consideration, we are clearly of the opinion that there is no such similarity in the labels as at present used, and that there is no such fraud shown in the conduct of the defendant as would authorize us to say that plaintiffs are entitled to relief.”

In the case at bar, appellees have not been guilty of any fraud or of any intent to deceive, as they have not

been selling or trying to sell their Lady Finger grapes as those of plaintiff. This is clearly shown by the entire evidence in the case, the labels themselves, and the statements of the trial court above referred to. The only question involved is whether or not the mere use of the word "Lady Finger" by appellees is legally improper.

IV. APPELLEES RIGHTFULLY USED THE WORD "LADY FINGER."

The decision of the lower court should be affirmed for all of the following reasons:

1. Prior use in America of the name "Lady Finger" as applied to white grapes of a certain variety and type. The evidence in the record clearly shows that before appellant's predecessor ever used the term, the word "Lady Fingers" was used in the grape growing districts of California.

2. Prior use in foreign countries of names which translated into the English language mean "Lady Fingers" as applied to white grapes of this variety and type grown and sold in foreign countries.

3. The name is generic in meaning.

4. The name has been and now is applied to the parent stock, and the words are rightfully used to characterize the product of the parent stock.

5. Laches on the part of appellant, in any event, prevent a recovery by it.

V. PRIOR USE IN AMERICA OF THE NAME "LADY FINGER" AS APPLIED TO WHITE GRAPES OF A CERTAIN VARIETY AND TYPE.

Appellees contend that they have never infringed

upon the trade-mark of the appellant, for the reason that appellant has never had a valid trade-mark. The evidence shows that defendants started to grow Lady Finger grapes in the year 1920, and did not ship them until the year 1921 or 1922, when the vines planted in 1920 came into production. However, Lady Finger grapes were shipped by other persons than appellees in large quantities in 1916, 1917 and 1918 (testimony of W. Flanders Setchell, R. 87), and Lady Finger grapes were sold in Fresno as early as thirty-five years prior to the trial of this action, as testified to by Joseph Arkell. (R. 103.)

Before there can be any infringement of a trade-mark, it should appear by a clear preponderance of evidence that the appellant was the first to appropriate the mark or symbol, and his exclusive use depends upon prior appropriation. (See *Metcalf v. Hanover Star Milling Co.*, 204 Fed. 211 at 216.)

K. Arkelian, a witness for defendants, testified that in 1883 he was acquainted with the variety of grapes known as "Lady Finger" grapes; that he saw this variety of grapes when he first came to Fresno and picked grapes on the Eisemann Vineyard; that it was grown on the said vineyard at that time under the name of "Lady Fingers"; that the foreman of the ranch called them "Lady Fingers." (R. 96, 97, and 98.)

Joseph Arkell, witness for defendants, testified that between thirty-five and thirty-eight years prior to the trial of this action, which would be about 1893, and which would be prior to the time appellant's predecessor in interest claims that he named the so-called "Lady

Finger” grapes, that the witness purchased these grapes on the Margarita Vineyard near Fresno and sold the grapes as “Lady Finger” grapes; that when he went to buy these grapes, he asked for the long, white grapes and the foreman of the Margarita Vineyard said, “Lady Fingers?”; that he learned from the foreman there that the name of the variety he wished was “Lady Fingers” (R. 103, 104, and 105); that he stopped peddling grapes when he was 19 or 20 years old and that it was over thirty-five years prior to the trial of this action when he first purchased these “Lady Finger” grapes. (R. 106.)

Mark Cosulich testified as follows: (R. 101, 102.)

“Question by Mr. Loftus: But the first time you heard the name ‘Lady Fingers’ in this country was in 1917 or ’18, was it?”

A. No. I heard that when I lived in Fresno in 1897 and 1898, before I was ever engaged in the grape shipping business.”

One of the defendants, Ben H. Arkelian, testified that he first saw this variety of grapes growing in the Eisemann Vineyard; that he was forty-three years of age at the time of the trial of this action; that when he first saw this variety of grape he was approximately ten years of age and that his father told him the name of the said grape; that the father translated the Turkish or Armenian word meaning “Lady Finger.” (R. 106.)

From the testimony of these four witnesses for defendants, it is clearly seen that the word “Lady Fingers” was the name of a well-known type or variety of grapes grown in the State of California before the appellants in this action, or their predecessor in interest,

adopted that name. The preponderance of evidence is against the contention of plaintiff that its predecessor in interest was the first to appropriate the name to his exclusive use.

The brief of appellants endeavors to discredit the testimony of these four witnesses by characterizing it as unsatisfactory and unreliable. However, these witnesses testified before Judge St. Sure in open court and he had every opportunity to determine whether or not their testimony was reliable and satisfactory or otherwise. The trial court rendered its decision in favor of the appellees, and that fact alone should be sufficient to overcome any objection on the part of the appellants as to the weight of this testimony. The trial judge saw and heard the witnesses testify in open court and he was satisfied with the truth of their statements.

The same observation should be made with reference to the claim by appellant concerning the testimony of witnesses adduced by it, conflicting with the above mentioned evidence. Appellant asks that the testimony of defendants' witnesses with regard to the Lady Finger grapes grown on the Eisemann Vineyard should be disregarded because there was some negative testimony on this subject by plaintiff's witnesses. A portion of Mr. Humphrey's testimony is referred to, in which he states that at one time he visited the Eisemann Vineyard and did not then see any Lady Finger grapes. Obviously, Mr. Humphrey cannot refute the positive testimony of appellees' witnesses by stating that he himself had never seen or heard of a Lady Finger grape in this particular vineyard. Mr. Humphrey

also testified that he had been on the Arakelian Vineyard near Bakersfield, and that upon that occasion grape vines were pointed out to him as Lady Finger vines, but that he himself could not tell whether they were vines of this variety, using as an excuse that the vines were too young. (R. 53.) How, then, could Mr. Humphrey be qualified to state positively that there were no Lady Finger grapes on the Eisemann Vineyard when there were 250 varieties of grapes grown there? (R. 121.)

Stress is also laid on the testimony of Edward I. Baber, who was formerly manager of the Eisemann Ranch, to the effect that there was never a grape on the Eisemann Vineyard known as the "Lady Finger" grape. Baber admitted, however, in his testimony that some white Cornichon grapes were grown on the Eisemann Vineyard (R. 114); that a grape called "Palomino Blanco" a long, oval-shaped grape of the Malaga family, was grown on the premises (R. 115) and that he had heard the name "Lady Finger" applied to grapes somewhere between the time he was on the vineyard from 1880 to 1916. (R. 117.)

The evidence shows that Mr. Humphrey's particular vine which is also known as the "Rish Baba," is not the only grape commonly called "Lady Finger." This name is applied to several varieties of grape, among them the Rish Baba, the white Cornichon, Pizzutello di Roma, Olivette Blanche and the Khanda-har. (R. 143.) All of these grapes are of a long, slender, white variety, with thin skins and firm meat, which is, at the same time, somewhat brittle and crisp. From

a vineyardist's standpoint, each grape perhaps varies slightly from the other, but from the ordinary retail purchaser's standpoint, they are all one type or class of grapes, known as "Lady Finger" grapes. Because Mr. Baber personally did not call these white grapes grown on the Eisemann Vineyard "Lady Finger" grapes, appellant seeks to discredit the entire testimony of appellees' witnesses.

Attention is also directed by appellant to the testimony of its witness, S. A. Lines, to the effect that he never saw or heard of any grapes called "Lady Finger" grapes on the Eisemann Vineyard and that he never heard of any "Lady Finger" grapes being grown on the Margarita Vineyard. Mr. Lines also testified that he has been connected with the Earl Fruit Company since 1902 or 1903; that he was local agent for the Earl Fruit Company at Fresno; that he never saw Lady Finger grapes for sale in Fresno (R. 122, 124); and that there were no grapes shipped by the Earl Fruit Company under the name "Lady Finger" to the knowledge of the witness. (R. 124, 125.)

Mr. Lines' testimony is rebutted by W. Flanders Setchel, who states that the Earl Fruit Company shipped Lady Finger grapes from the Frank H. Wilson place between the years 1916 and 1921. (R. 144, 145.)

Mr. Lines' testimony is essentially negative; his statement that he did not know of the growing of Lady Finger grapes in certain vineyards does not show that they were not in fact grown there. (R. 124, 128.)

It is therefore apparent that the trial court had before it ample evidence (conflicting, it is true, with evi-

dence adduced by appellant) to the effect that the term "Lady Finger" was applied to grapes of this variety and type in California even before the appellant's predecessor began to use the term as applied to grapes grown by himself.

VI. PRIOR USE IN FOREIGN COUNTRIES OF NAMES WHICH TRANSLATED INTO THE ENGLISH LANGUAGE MEAN "LADY FINGERS" AS APPLIED TO WHITE GRAPES OF THIS VARIETY AND TYPE GROWN AND SOLD IN FOREIGN COUNTRIES.

The record also clearly shows that in Turkey and in Dalmatia the words meaning "Lady Finger," in Turkish and in the Slavic language, were applied to this type and variety of grape many years before Mr. Humphrey began to use the term.

K. Arkelian, witness for defendants, testified that many years ago he was acquainted with this grape at and near Constantinople; that it was called in Turkish "Hanan Parmaghy," the translation of which into the English language is "Lady's Finger;" that he saw this variety of grape in Turkey in 1895 and bought some there in the month of August, 1895. (R. 96, 97.)

Mark Cosulich, a witness for defendants, testified that he was fifty years old in March, 1928 (R. 102); that when he was nine or ten years of age he made a visit to the city of Spalato in Dalmatia; that he went to a market there and saw these peculiar grapes; that the name of the grapes was "Gospodje Perst," which, in the English language, means "Lady Fingers." (R. 101.)

In connection with the reporting of the case of *Italian Swiss Colony v. Italian Vineyard Company*, [158 Cal. 252,] 32 L. R. A., N. S., at page 439, contains a note which reads in part as follows:

“No person is entitled to be protected in the use of a trade-mark of a word or phrase descriptive of the article to which it is applied; and by the great weight of authority, the fact that the word is a translation into English from a foreign word properly descriptive of the article in the language of the country in which it is produced, gives no greater right to its use as a trade-mark.”

Luyties v. Hollendeer, 30 Fed. 632;

Dadirrian v. Yacubian, 72 Fed. 1010;

Dadirrian v. Yacubian, 90 Fed. 812, affirmed 98 Fed. 872.

VII. THE NAME IS GENERIC IN MEANING.

From the foregoing testimony it appears beyond a doubt that the name “Lady Finger” was used to designate a well-known type or variety of grape long before Mr. Humphrey ever adopted or used it. Mr. Humphrey claims that he named his grapes “Lady Fingers,” because of the shape of the bunch and the shape of the grape, and that when he first saw a bunch of these grapes the name immediately suggested itself to him. (R. 35, 36.) Even if this testimony should be accepted at its face value, it is not unreasonable to suppose that the same descriptive term occurred many years ago to the Turks and Dalmatians who grew this type of grape, and to other California growers who likewise produced it.

Lady Finger is a name which is descriptive, and generic in its nature and is the appropriate name to

be applied in California and the United States to this type of long, slender, white grape; this name was applied to this grape before its use by Mr. Humphrey, both in foreign countries and in the United States. We have already referred to the fact that Webster's New International Dictionary defines "Lady Finger" as a variety of grape. The record shows that "Lady Fingers" are referred to and described as a variety of grape in various scientific horticultural works and in catalogues of nurseries. It is so listed in "California Horticulture" by George C. Roeding, copyrighted in 1909 (R. 82); one of the witnesses, W. Flanders Setchel, testified that he purchased a copy of this work in the early part of 1911 in Fresno. (R. 85). A similar entry was made in Armstrong's Catalogues (R. 81). There was also an entry of the term "Lady Fingers" as a variety of grape in the catalogues of the Fancher Creek Nurseries (R. 134).

The California Fruit, Nut and Vegetable Standardization Act of 1927, lists "Lady Finger" as a variety of grapes, and makes provisions and regulations relative to the shipment of the same under that name. The witness F. de Journal, an attorney, who owned and shipped Lady Finger grapes, testified that he was required by the Horticultural Commissioner of California to ship said grapes under that name. (R. 93).

The following evidence of Ben H. Arkelian is uncontradicted relative to the handling of Lady Finger grapes by him and the regulations enforced concerning the same:

"A. The Government lists them on their market report. The county or the state inspection

bureau writes certificates and calls them 'Lady Fingers.' Our County Horticulturist at Modesto, as well as Bakersfield, insists that we put the word 'Lady Finger' on the box because they are a 'Lady Finger' grape." (R. 112).

Mr. Humphrey himself, in portions of his testimony, seems to recognize that the word "Lady Finger" is descriptive of a variety or type of grape rather than an invented or trade name. This is indicated by the fact that on his labels he at all times emphasized the word "Humphrey;" his labels bore the words "Humphrey's Lady Fingers." (R. p. 47). The witness also testified:

"The Witness.—We ship our grapes in cars, in lugs, and brace them. Five or six years ago they were all crates. We have gradually changed until we ship almost all lugs. It is a modification of the Los Angeles lug. They have covers on them. Since I got the trade-mark, I place the label on the top side of the cover. Before that I stamped them on the end of the box 'Lady Finger' with a rubber stamp. I do the same thing with other varieties that I produce—Tokay, Cornichon, Emperor, and Malagas. I started doing that long before there was any Fruit and Vegetable Standardization Act; have done it for 38 years." (R. 58, 59).

If the word "Lady Fingers" were in fact recognized by appellant and its predecessor as an unique trade name meaning grapes of a certain type grown by appellant and its predecessor, it would scarcely have found it necessary constantly to emphasize the word "Humphrey" in connection with his labels.

Under the authorities it is clear that a generic name can not be exclusively adopted and appropriated by an

individual, and it is of course a question of fact to be determined from the evidence whether or not the name is a generic term. In the case of *Corbin v. Gould*, 133 U. S. 308, at page 314, (33 L. Ed. 611, 613) it is said:

“At the time complainants claim to have adopted the word ‘Tycoon’ as their trade-mark, for the particular species of tea dealt in by them, it was not an abandoned trade-mark previously used by some other person or firm to designate a particular quality of tea; but it was, and had been for many years, in general and common use as a term descriptive of a class of teas introduced into the American market—a term which all men engaged in the tea business had an equal right to use, and which belonged to no one individual either as a trade-mark or a trade label. It belonged to the public, as the common property of the trade, and therefore was not subject to appropriation by any one person. The following language used in *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. 599, quoted with approval by this court in *Delaware & H. Canal Co. v. Clark*, 80 U. S. 13 Wall. 311, 324 (20: 581, 583), is applicable to the claim of the complainant in this case: ‘He has no right to appropriate a sign or a symbol (or a name,) which, from the nature of the fact it is used to signify, others may employ with equal truth, and therefore have an equal right to employ for the same purpose.’ ”

In *Durton v. Stratton*, 12 Fed. 696, 701, it is said:

“The difficulty is in distinguishing cases where the property has acquired a generic name, as indicating the quality of the article rather than its origin or ownership . . . The only satisfactory rule we have been able to gather from the authorities is that in each case it is a matter for the court to determine, not alone from the mark itself, but from the testimony, whether the words have become so well known as to stand in the pub-

lic eye as denoting the character and quality of the article and not its origin or ownership. Thus, if it should appear that the article had been manufactured and sold by a number of dealers under a particular name, this would be decisive that the plaintiff had no right to the exclusive use of that name. Most if not all of these generic names were at first indicative of the origin, but finally, by constant use, ceased to subserve that purpose and have become indicative of a quality. An example of this is 'Fowler's Solution of Arsenic,' which clearly indicates origin, but the article is nevertheless put up by druggists all over the country, and this name has become public property. We think that most if not all of the cases upon this subject, when carefully examined will be found to have turned upon the extent to which the name is used, rather than upon the name itself. Thus, in the *A. C. A. Case*, 101 U. S. 51, it was said by the court that it was clear from the history of the adoption of the letters as narrated by the complainant and the device itself, that they were only intended to represent the highest quality of ticking manufactured by the plaintiff, and not its origin. It appeared that other letters were used to indicate inferior grades of the same article."

Mr. Humphrey had no right to a trade-mark of the name "Lady Fingers" for he was attempting to adopt a commonly known name of a variety or type of grapes.

VIII. THE NAME HAS BEEN AND NOW IS
APPLIED TO THE PARENT STOCK AND
THE WORDS ARE RIGHTFULLY USED TO
CHARACTERIZE THE PRODUCT OF THE
PARENT STOCK.

In the event that a tree or vine is commonly called by a distinguishing name, the product of such tree or vine may rightfully be called by the same dis-

tinguishing name. From a reading of the entire record in the case, the inference can be drawn that the name given by Mr. Humphrey to the vine which produced his grape was the "Lady Finger" grape-vine. It is common knowledge in California that the name of the vine and the name of the grapes grown on it are identical,— thus, Muscat grapes are grown on a Muscat grape vine, Malagas on a Malaga vine, Zinfandels on a Zinfandel vine, etc.

The witness Humphrey testified that he had been a vineyardist for many years, interested in the growing of grapes and in experimenting with various varieties of grapes; that when he first saw the shape of a bunch of grapes and the grapes themselves grown on a vine which he had planted, he immediately named the grape "Lady Finger." (R. 35, 36).

The witness also testified that he presented various persons who applied therefor with two cuttings of this grape vine (R. 41); that he followed this practice for many years after 1895; that he presented these cuttings to all applicants and that on the average he gave these cuttings to from three to six persons each year. (R. 51). Mr. Humphrey states that he notified these people to whom he gave cuttings that they must not use the word "Lady Fingers" as applied to the grapes produced, (R. 51) but it does not appear when this alleged notification took place. Neither does it appear that Mr. Humphrey had any contract of any kind with the persons to whom he gave the grape cuttings to the effect that they could not use the word "Lady Fingers" in shipping grapes grown from these cuttings, and it

may be inferred that Mr. Humphrey has only comparatively recently attempted to force an agreement with such persons, presumably by notifying them that he will sue to enjoin the use of the word “Lady Fingers” if they shipped grapes under that name.

It is not unreasonable to believe that Mr. Humphrey gave away these many grape cuttings by reason of his pride in the stock, and that no strings were attached to the gifts themselves until after he had consulted attorneys in about the year 1924 and was advised by them that he might seek to secure as a trade-mark the name “Lady Fingers” and thus eliminate competition in eastern markets. The origin of part of the Lady Finger grape vines owned by appellees is traced back directly to the original stock as shown by the following testimony:

“Q. Do you know where they came from?”
(Indicating Lady Finger grapes grown on the Arkelian place).

“A. Yes. Some of the vines I got were off some brush that Mr. Humphrey had given these people. They originally came from Mr. Humphrey’s ranch,—that he had given away . . .

Mr. Conley.—Q. Did Mr. Humphrey ever attempt . . .

A. (Continuing.)—and I think I got some from the seed farm at Davis.”

A portion of the opinion in *Hoyt v. Lovett*, 71 Fed. 173, reads as follows:

“The remaining objection to the bill is that the protection of a trademark cannot be obtained for an organic article which, by the law of its nature, is reproductive and derives its chief value from its innate vital powers, independently of the care,

management, or ingenuity of man. This question is conceded to be novel and unprecedented. Tested, however, by the general principles regulating sales of personal property, there is no doubt that a sale of seeds, plants or vines, when detached from the soil in which they grew, carries with it, on delivery, the right of property in the buyer, not only in the article so bought, but also in the natural increase or products of the same when sown or replanted. Neither the common law nor the statutes relating to trademarks extend the protection of tradenames to things which are valued more for their natural powers of reproduction and increase than for any other qualities. The facts in the present case afford an apt illustration of the incongruity of a contrary doctrine. A man buys a grapevine, to which is attached a metallic label stamped with the trademark of the seller. In the absence of a special contract between the parties, what is to prevent the buyer from cultivating the vine, and selling its products, whether of wood or of fruit, under the name of the parent stock? Certainly not a trademark. To repeat the words of Mr. Justice Strong: 'No one can obtain protection for the exclusive use of a trademark or tradename which would practically give him a monopoly in the sale of any goods other than those produced or made by himself.'

"The Hoyts did not make the Green Mountain vine, nor, strictly speaking, did they produce it. It grew out of the earth, was fashioned by nature, and endowed with powers and qualities which no human ingenuity or skill could create or imitate. If such protection as that now claimed by the complainants was allowed, a breeder of cattle could with equal propriety and reason demand like protection for the natural increase of his herd. In every aspect such claims would seem to be impracticable and inequitable."

It would appear from the Hoyt case that even though Mr. Humphrey might originally have applied for a trade-mark based upon the name "Lady Finger," he lost the right to that trade-mark for the reason that he gave away many cuttings without a special contract at the time to the effect that the parties growing said grapevines could not use the name "Lady Finger."

IX. LACHES ON THE PART OF APPELLANT,
IN ANY EVENT, PREVENT A RECOVERY BY
IT.

Even if it should be considered that Mr. Humphrey originally had the exclusive right to the word "Lady Finger" to designate a variety of grapes, appellant has lost that right because appellant and its predecessor failed to enforce their claim of right within a reasonable time after discovery that others were using the name "Lady Finger." Mr. Humphrey testified that he learned others were employing the name "Lady Fingers" somewhere between 1918 and 1920 (R. 39) and that he first heard the appellees were using the name within the last three years prior to the trial (R. 39)

W. Flanders Setchel stated that in 1918 in Sacramento he had a conversation with Mr. Humphrey in which the latter told him that others besides Mr. Humphrey were shipping the variety and type of grapes and using the name "Lady Finger" and that they should not do it. (R. 87 and 88). Mr. Setchel at that time told Mr. Humphrey that he had also grown Lady Finger grapes and was shipping them. (R. 88.)

We have already called the court's attention to the testimony of certain witnesses relative to the growing of Lady Finger grapes, and also to the fact that catalogues of nurserymen and treatises on horticulture characterized this type and variety of grape as the Lady Finger variety. There is additional evidence in the record showing the production and sale of Lady Fingers by various other persons. W. Flanders Setchel testified that he had a number of acres of Lady Finger grapes in the Carmelita Vineyard when he owned the same, and that these grapes were in bearing in the year 1915 (R. 86); that the product of his vines was shipped east and sold chiefly in New York and Chicago (R. 87); that in the years 1916, 1917 and 1918, he also shipped several carloads of Lady Finger grapes from the Lindsay district in Tulare County. (R. 87.)

Fernand de Journal testified that he undertook the management of the Carmelita Vineyards in 1921 (R. 90); that included in these vineyards was about twelve acres of Lady Finger grapes and that said grapes were known by that name by the trade and people generally (R. 91); that he first saw Lady Finger grapes in 1916 or 1917 when he visited the Carmelita Vineyard (R. 93).

Robert de Journal testified that he was a packer and shipper of fruit from Fresno County, and that he knew the variety of grapes called "Lady Fingers" (R. 94); that he had seen such grapes on the Carmelita Vineyard and also on the Frank H. Wilson Vineyard near Fresno (R. 95); that he had handled and shipped

said grapes under the name of Lady Fingers from Fresno County to eastern points. (R. 95).

In passing, it should be noted that a portion of the evidence cited in appellant's brief at first reading appears to stress unduly Mr. Humphrey's alleged attempts to prevent the use of the name. On page 25 of Brief for Appellants, the following portion of the record is quoted:

“Q. Who have you notified? A. The Earl Fruit Company and the California Fruit Exchange, who shipped about 12,000 cars I think a year. They have notified their representatives and have notified their growers to market the grapes under a name other than Lady Fingers.” (R. 62).

This statement of Mr. Humphrey's may be misleading; obviously, he means that the Earl Fruit Company and the California Fruit Exchange shipped about 12,000 cars of all varieties of grapes each year. It is clear from the record that there are not 12,000 cars of Lady Finger grapes grown each year in the State of California. Mr. Humphrey testifies (R. 42) that he has about 300 acres of Lady Finger grape vines and that he controls 90 per cent of the shipments. It is common knowledge that each carload of grapes contains from ten to twelve tons. Each acre of land produces about eight tons to the acre of Lady Finger grapes (R. 92). If it were true that 12,000 carloads of Lady Finger grapes were shipped by the fruit companies mentioned by Mr. Humphrey, that would mean that approximately 96,000 tons of grapes were shipped. This being ten percent of the shipments as testified to by

Mr. Humphrey, it would mean that the total number of tons of Lady Finger grapes shipped out of the State would be in the neighborhood of a million tons, which is potently erroneous.

In the case of *La Republique Francaise v. Saratoga Vichy Co.*, 191 U. S. 426, 446, the Supreme Court discusses the principle involved as follows:

“A serious difficulty in the way of enforcing an exclusive right on the part of the plaintiffs to the use of the word Vichy is their apparent acquiescence in such use by others. For thirty years the defendant, the Saratoga Vichy Company, has been openly and notoriously bottling and selling its waters under the name of the ‘Saratoga Vichy’ until its competition has become an extremely serious matter to the plaintiffs, whose importations began in 1853 with only 316 bottles, which by the year 1893 had increased to 298,500 bottles. The entire shipment of the Vichy company amounted in 1896 to nearly ten millions of bottles. Under such circumstances, and in view of the further facts that other waters were openly manufactured and sold in this country under the name of Vichy, and that a manufactured water was dealt out by the glass under that name in innumerable soda water fountains throughout the country, as shown by the record in this case, it is impossible to suppose that the plaintiffs were not aware of these infringements upon their exclusive rights. It argues much more than ordinary indifference and inattention to suppose that the large amount of this rival water could be advertised and sold all over the country without the knowledge of their agents, who would naturally be active in the protection of their own interests, if not the interests of their principals. In fact, they had allowed the name to become generic and indicative of the character of the water. With all these facts be-

fore them and with the yearly increasing sales and competition of the defendant company, no move was made against them for twenty five years, and until 1898, when this bill was filed. A clearer case of laches could hardly exist. *Saxlehner v. Eisner & M. Co.*, 179 U. S. 19, 45 L. ed. 60, 75, 21 Sup. St. Rep. 7.”

In *National Starch Mfg. Co. v. Munn's Patent Maizena & Starch Co.*, (1894) A. C. 275, it was held that the neglect of an owner of a trade mark to register it for twenty-four years, coupled with his failure during that period to restrain its use by others as a term descriptive of the article, made the name *publici juris* and disentitled the owner to enjoin its use by another to denote the character and quality of the article. And in *Ford v. Foster*, L. R. 7 Ch. 628, 41 L. J. Ch. N. S. 682, it was held that the right to a trade-mark is lost so as to bar the owner from restraining its infringement where the name has come to be so public and in such universal use that no one can be deceived by the use of it or can be induced by such use to believe that he is buying the goods of the original trader.

In the instant case, Mr. Humphrey permitted nurserymen and grape growers to use the name “Lady Fingers” for many years without asserting the rights which he now claims. He has permitted grape growers to expend thousands of dollars in planting vineyards to Lady Finger grapes and to marketing the same. He can not now come before a court of equity and ask that these growers, who have expended large sums of money in developing their property and their markets, be denied the right and privilege of using

that name in shipping their product. Had Mr. Humphrey registered his trade-mark shortly after he adopted the name "Lady Finger," perhaps his delay in failing to enforce his alleged rights would seem more excusable, since the trade-mark registration, coupled with the announcement of that fact on labels used by him, would be some notice to the world of his claim. But by his own testimony Mr. Humphrey admits that almost thirty years elapsed between the time he first used the word "Lady Fingers" and the registration of the trade-mark.

The only reason for granting anyone a trade-mark is in order that such person may be protected for money expended in building up a business and in order that the general public may be protected in its purchases. Even if Mr. Humphrey had a valid right to a trade-mark in 1895, he lost that right, because for many years thereafter he permitted the general public to adopt that name to classify a variety and type of white grapes grown in California.

X. CONCLUSION

For all of the reasons heretofore advanced, we respectfully submit that the decree of the trial court should be approved and affirmed. No valid trade-mark ever existed. The term "Lady Finger" as applied to a variety and type of white grapes was commonly used and employed both in this country and in foreign countries long before the appellant or its predecessor in interest ever adopted or used it. The word "Lady Finger" as applied to these grapes has a generic meaning and is not subject to exclusive appropria-

tion by appellant or any other person. Furthermore, in view of the giving away of cuttings from the parent stock of this grape vine without any showing of a binding contract not to apply the name to the grapes grown from these cuttings, and the laches of appellant and its predecessor in interest, there could be no recovery in this suit and the decree should be affirmed.

Dated: June 21st, 1929.

Respectfully submitted

W. M. CONLEY,
PHILIP CONLEY,
MATTHEW CONLEY,
Attorneys for Appellees.

United States
19
Circuit Court of Appeals
For the Ninth Circuit.

JOHN W. FELDER, MAURICE A. GALE,
GEORGE SCHMIDT and ROBERT
GIERKE, Copartners Doing Business as
FELDER, GALE AND COMPANY,
Appellants,

vs.

H. W. REETH,

Appellee.

Transcript of Record.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE TERRITORY OF ALASKA, FOURTH DIVISION.

FILED

FEB 28 1929

PAUL H. LUDWIG,

CLERK

United States
Circuit Court of Appeals
For the Ninth Circuit.

JOHN W. FELDER, MAURICE A. GALE,
GEORGE SCHMIDT and ROBERT
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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[Endorsed]: Filed Oct. 18, 1923.

In the District Court for the Territory of Alaska,
Fourth Division.

No. 460—I.

JOHN W. FELDER, MAURICE A. GALE,
GEORGE SCHMIDT and ROBERT
GIERKE, Copartners Doing Business Under
the Firm Name and Style of FELDER,
GALE and COMPANY,

Plaintiffs,

vs.

H. W. REETH,

Defendant.

COMPLAINT.

Come now the above-named plaintiffs, and for a first cause of action against the defendant H. W. Reeth, complain and allege:

1. That at all the times mentioned herein, plaintiffs were and are now copartners, engaged in a general mercantile business at Bethel, in the Fourth Division of Alaska and carrying on such business under the firm name and style of Felder, Gale and Company.

That during said times the defendant was engaged in mining in said Fourth Division of Alaska and resided at Akiak, Alaska; that he is still a resident of the Fourth Division of Alaska.

2. That between the 2d of February, 1920, and the 31st day of December, 1920, at Bethel aforesaid, at the special instance and request of the said defendant, plaintiffs sold and delivered to the defendant certain goods, wares and merchandise at and for the agreed price of Five Hundred Seven and 50/100 Dollars (\$507.50) for which said goods wares and merchandise the said defendant agreed to pay forthwith.

3. That no part of said account has been paid and that there is still due and owing from the defendant to plaintiffs on account thereof the full sum of \$507.50 and interest thereon at the rate of 8% per annum from December 31, 1920.

And for a second cause of action against the said defendant, these plaintiffs allege:

1. That at all the times mentioned herein, plaintiffs were and are now copartners, engaged in a general mercantile business at Bethel in the Fourth Division of Alaska, and carrying on such business under the firm name and style of Felder, Gale and Company. That the defendant during said time was and is a resident of the Fourth Division of Alaska, and engaged in mining.

2. That on or about the 28th day of July, 1919, at Bethel aforesaid, the defendant made, executed and delivered to one John Felder, his check for the sum of Two Hundred Twenty-five Dollars, of which check the following is a copy, to wit: [1*]

*Page-number appearing at the foot of page of original certified Transcript of Record.

THE SCANDINAVIAN AMERICAN BANK
19-8.

Member Federal Reserve Bank.

Bethel, Alaska, July 28, 1919. No. 54.

Pay to the order of John Felder \$225.00—Two hundred twenty five Dollars.

H. W. REETH.

3. That the said John Felder thereafter, and on the same day, endorsed his name upon the said check, and delivered the same to these plaintiffs, for value, and in the ordinary course of business; that plaintiffs accepted the same in good faith for value, as aforesaid.

4. That as soon as possible thereafter, plaintiffs duly presented the said check to the Drawee named therein, to wit: The Scandinavian American Bank, at their place of business at Seattle in the State of Washington, but that the said bank refused to pay the said check for the reason that the said defendant had not sufficient funds in said bank to pay the same.

5. That plaintiffs are still the holders in due course of said check; that no part thereof has been paid and that there is still due and owing on account thereof from the defendant to plaintiffs the sum of \$225.00 and interest thereon at the rate of 8% per annum from the 28th day of July, 1919.

And for a third cause of action against the said defendant, these plaintiffs allege:

1. That at all the times mentioned herein the plaintiffs were and are now copartners, engaged in a general mercantile business at Bethel, Alaska, under the firm name and style of Felder, Gale and Company. That during said time the defendant was engaged in mining and was and still is a resident of the Fourth Division of Alaska.

2. That on or about the 12th day of August, 1919, at Bethel aforesaid, the said defendant made, executed and delivered to one George Wood, his certain check for the sum of One Hundred Seventy-nine & 95/100 Dollars, of which check the following is a copy, to wit:

THE SCANDINAVIAN AMERICAN BANK
19-8.

Member Federal Reserve Bank,
Bethel, Alaska.

~~Seattle, Washington~~ August 12th, 1919. No. 59.

Pay to the order of George Wood \$179.95/100—
One hundred and Seventy-nine 95/100 Dollars.

H. W. REETH.

said check being for wages due from said defendant to said Geo. Wood.

3. That the said George Wood thereafter duly endorsed his name upon said check and delivered the same to these plaintiffs for value; and in the ordinary course of business; that plaintiffs accepted the same for value in good faith and thereby became the holder thereof in due course.

4. That as soon as possible thereafter, plaintiffs duly presented the said check to the Drawee named

therein, to wit: The Scandinavian American Bank, at their place of business at Seattle in the State of [2] Washington, for payment, but that the said bank refused to pay the said check for the reason that the said defendant did not have sufficient funds in said bank to pay the same. That the said bank then and there returned the said check to plaintiffs, marked N. S. F.

5. That these plaintiffs are still the holders in due course of said check; that no part thereof has been paid and that there is still due and owing from defendant to plaintiffs on account thereof the full sum of \$179.95 and interest thereon at the rate of 8% per annum from August 12th, 1919.

For a fourth cause of action against the said defendant H. W. Reeth, these plaintiffs allege:

1. That at all the times mentioned herein, plaintiffs were and are now copartners, engaged in a general mercantile business at Bethel in the Fourth Division of Alaska, under the firm name and style of Felder, Gale and Company. That during said time the defendant was engaged in mining and was and is now a resident of the Fourth Division of Alaska.

2. That on or about the 12th day of August, 1919, at Bethel aforesaid the said defendant H. W. Reeth made, executed and delivered to one Henry Peel, his certain check for the sum of Ten Dollars (\$10.00) of which check the following is a copy, to wit:

THE SCANDINAVIAN AMERICAN BANK
19-8.

Member Federal Reserve Bank,
Bethel, Alaska.

~~Seattle, Washington,~~ August 12th, 1919.

Pay to the order of Henry Peel \$10.00—Ten Dollars.

H. W. REETH.

said check being given for wages due from said defendant to said Peel.

3. That the said Henry Peel thereafter duly endorsed his name upon the said check and delivered the same to these plaintiffs for value, and in the ordinary course of business; that plaintiffs accepted the same for value, in good faith and thereby became the holder thereof in due course.

4. That these plaintiffs duly endorsed said check and as soon as possible thereafter duly presented the same for payment to the Drawee therein named; to wit: The Scandinavian American Bank, at their place of business at Seattle, in the State of Washington, but that the said bank refused to pay the said check for the reason that the defendant did not have sufficient funds in said bank to pay the same. That the said bank returned the said check to plaintiffs, marked N. S. F.

5. That these plaintiffs are still the holders in due course of said check; that no part thereof has been paid and that there is still due and owing from the defendant to these plaintiffs on account

thereof the sum of Ten Dollars and interest thereon at the rate of 8% per annum from August 12, 1919.
[3]

For a fifth cause of action against the defendant H. W. Reeth, these plaintiffs allege:

1. That at all the times herein mentioned, plaintiffs were and are now copartners, engaged in a general mercantile business at Bethel, Alaska, under the firm name and style of Felder, Gale and Company. That during said time the defendant was engaged in mining and was and is now a resident of the Fourth Division of Alaska.

2. That on or about the 27th day of August, 1919, at Bethel aforesaid, the said defendant made, executed and delivered to one W. G. Reno, his certain check for the sum of eighty dollars, of which check the following is a copy, to wit:

THE SCANDINAVIAN AMERICAN BANK
19-8.

Member Federal Reserve Bank,
Bethel, Alaska.

~~Seattle, Washington,~~ August 27, 1919. No. 61.

Pay to the order of W. G. Reno \$80.00—Eighty Dollars.

H. W. REETH.

said check being for wages due from said Reeth to the said W. G. Reno.

3. That the said W. G. Reno thereafter duly endorsed his name upon the said check and delivered the same to these plaintiffs for value, and in the

ordinary course of business; that plaintiffs accepted the same for value in good faith and thereby became the holder thereof in due course.

4. That plaintiffs duly endorsed the said check and as soon as possible thereafter presented the same for payment to the Drawee therein named, to wit: The Scandinavian American Bank, at their place of business at Seattle in the State of Washington, but that the said bank refused to pay the same for the reason that the defendant did not have sufficient funds in said bank to pay the same. That the said bank returned the said check to plaintiffs, marked N. S. F.

5. That these plaintiffs are still the holders of said check; that no part thereof has been paid and that there is still due and owing from the defendant to these plaintiffs on account thereof the sum of Eighty dollars and interest thereon at the rate of 8% per annum from August 27th, 1919.

And for a sixth cause of action against the said defendant H. W. Reeth, these plaintiffs allege:

1. That at all the times herein mentioned, plaintiffs were and are now copartners, engaged in a general mercantile business at Bethel, in the Fourth Division of Alaska, under the firm name and style of Felder Gale and Company. That during said time the defendant was engaged in mining and was and is now a resident of the Fourth Division of Alaska.

2. That on or about the 27th day of August, 1919, at Bethel aforesaid the said defendant made, executed and delivered to one P. Fry, his certain

check for the sum of eighteen dollars, of which check the following is a copy, to wit:

THE SCANDINAVIAN AMERICAN BANK
19-8.

Member Federal Reserve Bank,

Bethel, Alaska.

~~Seattle, Washington,~~ August 27th, 1919 No. 62.

Pay to the order of P. Fry \$18.00— [4] Eighteen Dollars.

H. W. REETH.

said check being for wages due from the said Reeth to the said P. Fry.

3. That the said P. Fry thereafter duly endorsed his name upon the said check and delivered the same to these plaintiffs for value and in the ordinary course of business; that plaintiffs accepted the same for value, in good faith, and thereby became the holders thereof in due course.

4. That these plaintiffs duly endorsed the said check, and as soon as possible thereafter, duly presented the same for payment to the Drawee therein named, to wit: The Scandinavian American Bank, at their place of business at Seattle in the State of Washington, but that the said bank refused to pay the same for the reason that the defendant did not have sufficient funds in said bank to pay the said check. That the said bank returned the said check to plaintiffs, marked N. S. F.

5. That these plaintiffs are still the holders of said check; that no part thereof has been paid and

that there is still due and owing from the defendant to plaintiffs on account thereof, the sum of eighteen dollars and interest thereon at the rate of 8% per annum from August 27th, 1919.

And for a seventh cause of action against the said defendant, these plaintiffs allege:

1. That at all the times herein mentioned, plaintiffs were and are now copartners, engaged in a general mercantile business at Bethel in the Fourth Division of Alaska, under the firm name and style of Felder, Gale and Company; that during said time the defendant was engaged in mining near Bethel, aforesaid, and was and is now a resident of the Fourth Division of Alaska.

2. That on or about the 27th day of August, 1919, at Bethel, aforesaid, the said defendant made, executed and delivered to one C. H. Stickler, his certain check for the sum of Two Hundred Sixty-six Dollars and Fifty Cents (\$266.50) of which check, the following is a copy, to wit:

THE SCANDINAVIAN AMERICAN BANK
19-8.

Member Federal Reserve Bank.

Bethel, Alaska.

~~Seattle, Washington,~~ August 27th, 1919 No. 65.

Pay to the order of C. H. Stickler \$266.50—Two hundred sixty-six 50/100 Dollars.

H. W. REETH.

said check being for wages due from said Reeth to said C. H. Stickler.

3. That the said C. H. Stickler thereafter duly endorsed his name upon said check and delivered the same to these plaintiffs for value and in the ordinary course of business; that plaintiffs accepted the same for value in good faith and thereby became the holders in due course of the said check.

4. That plaintiffs as soon as possible thereafter duly presented the said check for payment to the Drawee therein named, to wit: The Scandinavian American Bank, at its place of business at Seattle, in the State of Washington, but that the said bank refused to pay the said check for the reason that the defendant did not have sufficient funds in said bank to pay the same. That the said bank returned [5] the said check to these plaintiffs, marked N. S. F.

5. That these plaintiffs are still the holders of the said check; that no part thereof has been paid and that there is still due and owing from the defendant to plaintiffs on account thereof the full sum of \$266.50 and interest thereon at the rate of 8% per annum from August 27th, 1919.

And for an eighth cause of action against the said H. W. Reeth, these plaintiffs allege:

1. That at all the times herein mentioned, plaintiffs were and are now copartners, engaged in a general mercantile business at Bethel, Alaska, under the firm name and style of Felder, Gale and Company; that during said time the defendant H. W. Reeth was engaged in mining near Bethel, aforesaid

and was and is a resident of the Fourth Division of Alaska.

2. That on or about the 27th day of August, 1919, at Bethel, Alaska, the said defendant made, executed and delivered to one C. H. Stickler, his certain check for the sum of One Hundred Fifty-five Dollars, of which check, the following is a copy, to wit:

THE SCANDINAVIAN AMERICAN BANK
19-8.

Member Federal Reserve Bank,
Bethel, Alaska.

~~Seattle, Washington,~~ August 27th, 1919 No. 66.

Pay to the order of C. H. Stickler \$155.00—One hundred and fifty-five Dollars.

H. W. REETH.

said check being for wages due from said Reeth to said C. H. Stickler.

3. That the said C. H. Stickler thereafter duly endorsed his name upon the said check and delivered the same to these plaintiffs for value and in the ordinary course of business; that plaintiffs accepted the same for value, in good faith, and thereby became the holders thereof in due course.

4. That these plaintiffs duly endorsed the said check, and as soon as possible thereafter, duly presented the same for payment to the Drawee named therein, to wit: The Scandinavian American Bank, at its place of business at Seattle, in the State of Washington, but that the said bank refused to pay

the said check for the reason that the defendant did not have sufficient funds in said bank to pay the same.

5. That these plaintiffs are still the holders of said check; that no part thereof has been paid and that there is still due and owing from the defendant to plaintiffs on account thereof the sum of One Hundred Fifty-five Dollars and interest thereon at the rate of 8% per annum from August 27th, 1919.

And for a ninth cause of action against the said defendant H. W. Reeth, these plaintiffs allege:

1. That at all the times herein mentioned, plaintiffs were and are now copartners, engaged in a general mercantile business at Bethel, in the Fourth Division of Alaska, under the firm name and style of Felder, Gale and Company; that during said time the defendant was engaged in mining and was and is now a resident of the Fourth Division of Alaska. [6]

2. That on or about the 27th day of August, 1919, at Bethel aforesaid, the said defendant made, executed and delivered to one August Berg, his certain check for the sum of Ten Dollars, of which check the following is a copy, to wit:

THE SCANDINAVIAN AMERICAN BANK
19-8.

Member Federal Reserve Bank,
Bethel, Alaska.

~~Seattle, Washington,~~ August 27th, 1919 No. 67.

Pay to the order of August Berg \$10.00—Ten Dollars.

H. W. REETH.

which said check was for wages due from said Reeth to said Berg.

3. That the said August Berg thereafter duly endorsed his name upon the said check and delivered the same to these plaintiffs for value, and in the ordinary course of business; that plaintiffs accepted the same for value, in good faith and thereby became the holders thereof in due course.

4. That these plaintiffs duly endorsed the said check and as soon as possible thereafter duly presented the same for payment to the Drawee named therein, to wit: The Scandinavian American Bank, at its place of business at Seattle, in the State of Washington, but that the said bank refused to pay the said check for the reason that the said defendant did not have sufficient funds in said bank to pay the same. That the said bank returned the said check to plaintiffs marked N. S. F.

5. That these plaintiffs are still the holders of the said check; that no part thereof has been paid and that there is still due and owing from the said defendant to these plaintiffs on account thereof the

sum of \$155.00 and interest thereon at the rate of 8% per annum from August 27th, 1919.

And for a tenth cause of action against the said H. W. Reeth, these plaintiffs allege:

1. That at all the times herein mentioned these plaintiffs were and are now copartners, engaged in a general mercantile business at Bethel in the Fourth Division of Alaska, under the firm name and style of Felder, Gale and Company; that during said time the defendant was engaged in mining near Bethel aforesaid and was and is now a resident of the Fourth Division of Alaska.

2. That on or about the 28th day of August, 1919, at Bethel aforesaid, the said defendant made, executed and delivered to one Henry Peel, his certain check for the sum of One Hundred and Fifty Dollars, of which check, the following is a copy, to wit:

THE SCANDINAVIAN AMERICAN BANK
19-8.

Member Federal Reserve Bank,

Bethel, Alaska.

~~Seattle, Washington,~~ August 28th, 1919 No. 68.

Pay to the order of Henry Peel \$150.00—One hundred and fifty dollars.

H. W. REETH.

which said check was given for wages due from the said H. W. Reeth to the said Henry Peel. [7]

3. That the said Henry Peel thereafter duly endorsed his name upon the said check and deliv-

ered the same to these plaintiffs for value, and in the ordinary course of business; that plaintiffs accepted the same for value and in good faith, and thereby became the holders thereof in due course.

4. That these plaintiffs duly endorsed the said check and as soon as possible thereafter duly presented the same for payment to the Drawee therein named, to wit: The Scandinavian American Bank, at its place of business at Seattle in the State of Washington, but that the said bank refused to pay the said check for the reason that the said defendant did not have sufficient funds in said bank to pay the same. That the said bank returned the said check to plaintiffs marked N. S. F.

5. That these plaintiffs are still the holders of the said check; that no part thereof has been paid and that there is still due and owing from the defendant to plaintiffs on account thereof the sum of One Hundred Fifty Dollars and interest thereon at the rate of 8% per annum from August 28th, 1919.

And for an eleventh cause of action against the said H. W. Reeth, these plaintiffs allege:

1. That at all the times herein mentioned the plaintiffs were and are now copartners, engaged in a general mercantile business at Bethel in the Fourth Division of Alaska, under the firm name and style of Felder, Gale and Company. That during said time the said defendant was engaged in mining near Bethel aforesaid, and was and is now a resident of the Fourth Division of Alaska.

2. That on or about the 28th day of August, 1919, at Bethel aforesaid, the said defendant H. W. Reeth made, executed and delivered to one Henry Peel, his certain check for the sum of \$180.00, of which said check the following is a copy, to wit:

THE SCANDINAVIAN AMERICAN BANK
19-8

Member Federal Reserve Bank,

Bethel, Alaska. August 28th, 1919. No. 70.
~~Seattle, Washington,~~

Pay to the order of Henry Peel \$180.00—One
Hundred and eighty Dollars.

H. W. REETH

which said check was for wages due from said
Reeth to said Hy. Peel.

3. That the said Henry Peel thereafter duly endorsed his name upon the said check and delivered the same to these plaintiffs for value, and in the ordinary course of business; that these plaintiffs accepted the same for value and in good faith, and thereby became the holders thereof in due course.

4. That these plaintiffs duly endorsed the said check and as soon as possible thereafter presented the same for payment to the Drawee therein named, to wit: The Scandinavian American Bank, at its place of business at Seattle in the State of Washington, but that the said bank refused to pay the said check for the reason that the said defendant

did not have sufficient funds in said bank to pay the same. That the said bank returned the said check to these plaintiffs, marked N. S. F. [8]

5. That these plaintiffs are still the holders of the said check; that no part thereof has been paid and that there is still due and owing from the defendant to plaintiffs the sum of \$180.00 on account thereof, and interest thereon at the rate of 8% per annum from the 28th day of August, 1919.

And for a twelfth cause of action against the said defendant these plaintiffs allege:

1. That at all the times herein mentioned, the plaintiffs were and are now copartners, engaged in a general mercantile business at Bethel, in the Fourth Division of Alaska, under the firm name and style of Felder, Gale and Company; that during said time the defendant was engaged in mining and was and is now a resident of the Fourth Division of Alaska.

2. That on or about August 28th, 1919, at Bethel, aforesaid, the said defendant made, executed and delivered to one Henry Peel, his certain check for the sum of \$9.10, of which said check, the following is a copy, to wit:

THE SCANDINAVIAN AMERICAN BANK
19-8

Member Federal Reserve Bank,

Bethel, Alaska. August 28th, 1919. No. 71

~~Seattle, Washington,~~

Pay to the order of Henry Peel \$9.10—
Nine 10/100 Dollars.

H. W. REETH

said check being given for wages due from said
Reeth to said Peel.

3. That the said Henry Peel thereafter duly
endorsed his name upon said check and delivered
the same to these plaintiffs for value; and in the
ordinary course of business. That plaintiffs ac-
cepted the said check for value and in good faith
and thereby became the holders thereof in due
course.

4. That these plaintiffs duly endorsed said check
and as soon as possible thereafter presented the
same for payment to the Drawee named therein,
to wit: The Scandinavian American Bank, at its
place of business at Seattle in the State of Wash-
ington, but that the said bank refused to pay the
said check for the reason that the defendant did
not have sufficient funds in the said bank to pay
the same. That the said bank returned the said
check to plaintiffs, marked N. S. F.

5. That these plaintiffs are still the holders of
the said check; that no part thereof has been paid

and that there is still due and owing from the defendant to these plaintiffs on account thereof, the sum of Nine and 10/100 Dollars and interest thereon at the rate of 8% per annum from August 28th, 1919.

And for a thirteenth cause of action against the said defendant, these plaintiffs allege:

1. That at all the times herein mentioned these plaintiffs were and are now copartners, engaged in a general mercantile business at Bethel in the Fourth Division of Alaska, under the firm name and style of Felder, Gale and Company; that during said time the defendant was mining near Bethel, Alaska, and was and is now a resident of the Fourth Division of Alaska. [9]

2. That on or about September 7th, 1919, at Bethel, aforesaid, the said defendant H. W. Reeth made, executed and delivered to one Andrew Holmlund, his certain check for the sum of Fifty Dollars, of which said check the following is a copy, to wit:

THE SCANDINAVIAN AMERICAN BANK
19-8

Member Federal Reserve Bank,

Bethel, Alaska. September 7th, 1919 No. 78
~~Seattle, Washington,~~

Pay to the order of Andrew Holmlund \$50.00
Fifty Dollars.

H. W. REETH

said check being for wages due from said Reeth to said And. Holmlund.

3. That the said Andrew Holmlund thereafter duly endorsed his name upon the said check and delivered the same to these plaintiffs for value and in the ordinary course of business; that plaintiffs accepted the said check for value and in good faith and thereby became the holders thereof in due course.

That these plaintiffs duly endorsed said check and as soon as possible thereafter, duly presented the same for payment to the Drawee therein named, to wit: the Scandinavian American Bank, at its place of business in Seattle, in the State of Washington, but that the said bank refused to pay the said check for the reason that the said defendant did not have sufficient funds in said bank to pay the same; that the said bank returned the said check to plaintiffs marked N. S. F.

5. That these plaintiffs are still the holders of the said check; that no part thereof has been paid and that there is still due and owing from the said defendant to these plaintiffs on account thereof the sum of Fifty dollars and interest thereon at the rate of 8% per annum from September 7th, 1919.

And for a fourteenth cause of action against the said H. W. Reeth, plaintiffs allege:

1. That at all the times herein mentioned, these plaintiffs were and are now copartners, engaged in a general mercantile business at Bethel in the Fourth Division of Alaska, under the firm name

and style of Felder, Gale and Company; that during the said time the defendant was engaged in mining and was and is now a resident of the Fourth Division of Alaska.

2. That on or about October 5th, 1919, at Bethel aforesaid, the said defendant made, executed and delivered to one M. Johnson, the certain check for the sum of Two Hundred Twenty-one & 50/100 Dollars (\$221.50), of which said check the following is a copy, to wit:

THE SCANDINAVIAN AMERICAN BANK
19-8

Member Federal Reserve Bank,
Bethel, Alaska. ~~Seattle, Washington,~~
October 5th, 1919 No. 80
Pay to the order of M. Johnson \$221.50—Two
hundred twenty-one 50/100 Dollars.

H. W. REETH.

the said check being given for wages due from the said Reeth to the said M. Johnson. [10]

3. That the said M. Johnson duly thereafter endorsed his name upon the said check and delivered the same to these plaintiffs for value, and in the ordinary course of business; that plaintiffs accepted the same for value and in good faith and thereby became the holders thereof in due course.

4. That these plaintiffs duly endorsed said check and as soon as possible thereafter presented the same for payment to the Drawee therein named, to wit: The Scandinavian American Bank, at its

place of business in Seattle in the State of Washington, but that the said bank refused to pay the said check for the reason that the defendant did not have sufficient funds in said bank with which to pay the same. That said bank returned said check to plaintiffs, marked N. S. F.

5. That plaintiffs are still the holders of the said check; that no part thereof has been paid and that there is still due and owing on account thereof from the defendant to plaintiffs the sum of \$221.50 and interest thereon at the rate of 8% per annum from October 5, 1919.

And for a fifteenth cause of action against the said defendant, these plaintiffs allege:

That at all the times herein mentioned, plaintiffs were and are now copartners, engaged in a general mercantile business at Bethel, in the Fourth Division of Alaska, under the firm name and style of Felder, Gale and Company. That during the said time the defendant was engaged in mining near Bethel aforesaid, and was and is now a resident of the Fourth Division of Alaska.

2. That on or about October 5th, 1919, at Bethel, aforesaid, the said defendant made, executed and delivered to plaintiffs, for value, his certain check for the sum of \$231.50, of which said check, the following is a copy, to wit:

THE SCANDINAVIAN AMERICAN BANK
19-8

Member Federal Reserve Bank,

Bethel, Alaska.

~~Seattle, Washington,~~

October 5th, 1919 No. 81

Pay to the order of Felder & Gale \$231.50—Two hundred thirty one 50/100 Dollars.

H. W. REETH.

3. That these plaintiffs accepted the said check for value and in good faith, and thereafter duly endorsed the same, and as soon as possible thereafter presented the same for payment to the Drawee therein named, to wit: the Scandinavian American Bank, at its place of business in Seattle in the State of Washington, but that the said bank refused to pay the said check for the reason that the defendant did not have sufficient funds in said bank with which to pay the same. That said bank returned the said check to plaintiffs marked N. S. F.

4. That these plaintiffs are still the holders of the said check; that no part thereof has been paid and that there is still due and owing from the defendant to plaintiffs on account thereof the sum of \$231.50 and interest thereon from the 5th day of October, 1919. [11]

For a sixteenth cause of action against the said defendant, these plaintiffs allege:

1. That at all the times herein mentioned the plaintiffs were and are now copartners, engaged in a general mercantile business at Bethel in the Fourth Division of Alaska, under the firm name and style of Felder, Gale and Company; that during said time the defendant was engaged in mining near Bethel aforesaid, and was and is now a resident of the Fourth Division of Alaska.

2. That on or about October 25th, 1919, at Bethel, Alaska, the said defendant made, executed and delivered to one Oscar Samuelson, his certain check for the sum of Ten Dollars, of which said check the following is a copy, to wit:

THE SCANDINAVIAN AMERICAN BANK
19-8

Member Federal Reserve Bank,
Bethel, Alaska, ~~Seattle, Washington,~~
Octo. 25th, 1919 No. 86

Pay to the order of Oscar Samuelson \$10.00—
Ten Dollars.

H. W. REETH.

said check being for wages due from said Reeth to said Samuelson.

3. That the said Oscar Samuelson thereafter duly endorsed his name upon the said check and delivered the same to these plaintiffs for value and in the ordinary course of business; that plaintiffs accepted the same for value and in good faith, and thereby became the holders thereof in due course.

4. That these plaintiffs duly endorsed the said

check and as soon as possible thereafter presented the same for payment to the Drawee named therein, to wit: the Scandinavian American Bank, at its place of business in Seattle, in the State of Washington, but that the said bank refused to pay the said check for the reason that the defendant did not have sufficient funds in said bank with which to pay the same. That said bank returned the said check to plaintiffs, marked N. S. F.

5. That plaintiffs are still the holders of the said check; that no part thereof has been paid and that there is still due and owing from the defendant to these plaintiffs on account thereof the sum of \$10.00 and interest thereon at the rate of 8% per annum from October 25th, 1919.

And for a seventeenth cause of action against the said H. W. Reeth, defendant aforesaid, these plaintiffs allege:

That at all the times herein mentioned, plaintiffs were and are now copartners, engaged in a general mercantile business at Bethel in the Fourth Division of Alaska under the firm name and style of Felder, Gale and Company; that during said time the defendant was engaged in mining near Bethel, aforesaid, and was and is now a resident of the Fourth Division of Alaska.

2. That on or about October 25th, 1919, at Bethel aforesaid, the said defendant made, executed and delivered to one August Berg, his certain check for the sum of Two Hundred Dollars, of which said check the following is a copy, to wit:

THE SCANDINAVIAN AMERICAN BANK
19-8

Member Federal Reserve Bank.

Bethel, Alaska, ~~Seattle, Washington,~~
Oct. 25th, 1919 No. 87

Pay to the order of August Berg \$200.00—Two
Hundred Dollars.

H. W. REETH.

said check being given for wages due from said
Reeth to said Berg.

3. That the said August Berg thereafter duly
endorsed his name on said check and delivered the
same to these plaintiffs for value and in the ordi-
nary course of business; that plaintiffs accepted
the same for value and in good faith, and thereby
became the holders thereof in due course.

4. That plaintiffs duly endorsed said check and
as soon as possible thereafter duly presented the
same for payment to the Drawee therein named, to
wit: The Scandinavian American Bank, at their
place of business in Seattle in the State of Wash-
ington, but that the said bank refused to pay the
same for the reason that the said defendant did not
have sufficient funds in said bank with which to pay
the said check. That the said bank thereafter re-
turned the said check to the plaintiffs, marked
N. S. F.

5. That these plaintiffs are still the holders of
said check; that no part thereof has been paid, and

that there is still due and owing from the defendant to plaintiffs on account thereof the sum of Two Hundred Dollars and interest thereon at the rate of 8% per annum from October 25th, 1919.

For an eighteenth cause of action against the said defendant H. W. Reeth, these plaintiffs allege:

That at all the times herein mentioned, plaintiffs were and are now copartners, engaged in a general mercantile business at Bethel, in the Fourth Division of Alaska, under the firm name and style of Felder, Gale and Company. That during the said time the defendant was engaged in mining near Bethel aforesaid, and was and is now a resident of the Fourth Division of Alaska.

2. That on or about the 25th day of October, 1919, at Bethel aforesaid, the said defendant H. W. Reeth made, executed and delivered to one Andrew Holmlund, his certain check for the sum of \$75.00, of which said check the following is a copy, to wit:

THE SCANDINAVIAN AMERICAN BANK
19-8

Member Federal Reserve Bank.

Bethel, Alaska,

~~Seattle, Washington,~~

Oct. 25th, 1919 No. 88

Pay to the order of Andrew Holmlund \$75.00—
Seventy Five Dollars.

H. W. REETH.

said check being for wages due from said Reeth to said Holmlund.

3. That the said Andrew Holmlund thereafter endorsed his name upon the said check and delivered the same to these plaintiffs for value and in the ordinary course of business; that plaintiffs accepted the same for value and in good faith, and thereby became the holders thereof in due course.
[13]

4. That these plaintiffs duly endorsed the said check, and as soon as possible thereafter, presented the same for payment to the Drawee therein named, to wit: the Scandinavian American Bank, at its place of business in Seattle, in the State of Washington, but that the said bank refused to pay the said check for the reason that the said defendant did not have sufficient funds in said bank with which to pay the same. That the said bank returned the said check to plaintiffs, marked N. S. F.

5. That these plaintiffs are still the holders of the said check; that no part thereof has been paid and that there is still due and owing from the defendant to plaintiffs on account thereof the sum of seventy-five dollars and interest thereon at the rate of 8% per annum from October 25, 1919.

And for a nineteenth cause of action against the said defendant, H. W. Reeth, these plaintiffs allege:

1. That at all the times herein mentioned, these plaintiffs were, and are now copartners, engaged in a general mercantile business at Bethel in the Fourth Division of Alaska, under the firm name

and style of Felder, Gale and Company; that during said time the said defendant H. W. Reeth was engaged in mining near Bethel, aforesaid, and was and is now a resident of the Fourth Division of Alaska.

2. That on or about October 25th, 1919, at Bethel, Alaska, the said defendant made, executed and delivered to one H. W. Reeth his certain check for the sum of \$25.00, of which said check, the following is a copy, to wit:

THE SCANDINAVIAN AMERICAN BANK
19-8

Member Federal Reserve Bank.

Bethel, Alaska,

~~Seattle, Washington,~~

Oct. 25th, 1919 No. 90

Pay to the order of H. W. Reeth \$25.00—
Twenty Five Dollars.

H. W. REETH.

3. That the said H. W. Reeth thereafter endorsed his name upon said check and delivered the same to these plaintiffs for value and in the ordinary course of business; that plaintiffs accepted the same for value, in good faith and thereby became the holders thereof in due course.

4. That plaintiffs endorsed said check and as soon as possible thereafter presented the same for payment to the Drawee therein named, to wit: the Scandinavian American Bank, at its place of business in Seattle in the State of Washington, but that the said bank refused to pay the said check for

the reason that the said defendant did not have sufficient funds in said bank with which to pay the same. That the said bank returned the said check to plaintiffs, marked N. S. F.

5. That plaintiffs are still the holders of the said check; that no part thereof has been paid and that there is still due and owing from the defendant to plaintiffs on account thereof the sum of \$25.00 and interest thereon at the rate of 8% per annum from October 25, 1910. [14]

For a twentieth cause of action against the said defendant H. W. Reeth, plaintiffs allege.

1. That at all the times herein mentioned plaintiffs were and are now copartners, engaged in a general mercantile business at Bethel, in the Fourth Division of Alaska, under the firm name and style of Felder, Gale and Company. That during said time the defendant was engaged in mining near Bethel, aforesaid, and was and is now a resident of the Fourth Division of Alaska.

2. That on or about November 9th, 1919, at Bethel, aforesaid, the said defendant made, executed and delivered to one Robert Agavgoak, his certain check for the sum of \$7.00, of which said check the following is a copy, to wit:

THE SCANDINAVIAN AMERICAN BANK
19-8

Member Federal Reserve Bank.

Bethel, Alaska,

~~Seattle, Washington,~~

Nov. 9th, 1919 No. 94

Pay to the order of Robert Agavgoak \$7.00—
Seven Dollars.

H. W. REETH.

said check being for wages due from said Reeth to said R. Agavgoak.

3. That the said Robert Agavgoak thereafter endorsed his name upon said check and delivered the same to these plaintiffs for value and in the ordinary course of business; that plaintiffs accepted the same for value and in good faith, and thereby became the holders thereof in due course.

4. That as soon as possible thereafter these plaintiffs presented the said check for payment to the Drawee therein named, to wit: to The Scandinavian American Bank at its place of business in Seattle, in the State of Washington, but that the said bank refused to pay the said check for the reason that the said defendant did not have sufficient funds in said bank with which to pay the same. That the said bank returned the said check to plaintiffs.

5. That these plaintiffs are still the holders of the said check; that no part thereof has been paid and that there is still due and owing from the defendant to the plaintiffs on account thereof the sum

of \$7.00 and interest thereon at the rate of 8% per annum from November 9th, 1919.

And for a twenty-first cause of action against the said defendant, these plaintiffs allege:

1. That at all the times herein mentioned these plaintiffs were and are now copartners, engaged in a general mercantile business at Bethel in the Fourth Division of Alaska, under the firm name and style of Felder, Gale and Company; that during said time the defendant was engaged in mining near Bethel aforesaid, and was and is now a resident of the Fourth Division of Alaska.

2. That on or about the 14th day of November, 1919, at Bethel, Alaska, the said defendant H. W. Reeth made, executed and delivered to plaintiffs for value, his certain check for the sum of \$183.00; of which check, the following is a copy, to wit: [15]

THE SCANDINAVIAN AMERICAN BANK
19-8

Member Federal Reserve Bank.

Bethel, Alaska,

Seattle, ~~Washington,~~

Nov. 14th, 1919 No. 96

Pay to the order of Felder & Gale \$183.00—One hundred eighty three Dollars.

H. W. REETH.

3. That these plaintiffs accepted the said check for and at its face value and in the ordinary course of business and in good faith; and thereafter duly endorsed the same and as soon as possible presented

the same for payment to the Drawee therein named, to wit: the Scandinavian American Bank at its place of business in Seattle, in the State of Washington, but that said bank refused to pay the said check for the reason that the defendant did not have sufficient funds in said bank with which to pay the same, and returned the said check to plaintiffs, marked N. S. F.

4. That these plaintiffs then and there caused the said check to be protested for and on account of such nonpayment and was obliged to and did pay the further sum of \$3.65 on account such protest and notices thereof.

5. That plaintiffs are still the holders of said check; that no part thereof has been paid, and that there is still due and owing from the defendant to plaintiffs on account thereof the sum of One Hundred Eighty-three Dollars and interest thereon at the rate of 8% per annum from November 14th, 1919, and the further sum of \$3.65 protest charges as aforesaid.

And for a twenty-second cause of action against the said defendant, these plaintiffs allege:

1. That at all the times herein mentioned these plaintiffs were, and are now copartners, engaged in a general mercantile business at Bethel in the Fourth Division of Alaska, under the firm name and style of Felder, Gale and Company, that during said time the said defendant H. W. Reeth was engaged in mining near Bethel, aforesaid, and was and is now a resident of the Fourth Division of Alaska.

2. That on or about the 24th day of December, 1919, at Bethel, aforesaid, the said defendant H. W. Reeth made, executed and delivered to one August Berg, his certain check for the sum of Five Dollars, of which check the following is a copy, to wit:

THE SCANDINAVIAN AMERICAN BANK
19-8

Member Federal Reserve Bank,

Bethel, Alaska,

~~Seattle, Washington,~~

Dec. 24th, 1919 No. 105

Pay to the order of August Berg \$5.00—Five Dollars.

H. W. REETH.

said check being given for wages due from said Reeth to said A. Berg.

3. That the said August Berg thereafter endorsed his name upon said check and delivered the same to these plaintiffs for value and in the ordinary course of business; that plaintiffs accepted the same for value and in good faith and thereupon became the holders thereof in due course. [16]

4. That as soon as possible thereafter, plaintiffs presented the said check for payment to the Drawee therein named, to wit: the Scandinavian American Bank, at its place of business at Seattle in the State of Washington, but that the said bank refused to pay the same for the reason that the said defendant did not have sufficient funds in said bank with which to pay the same, and returned the said check to plaintiffs.

5. That plaintiffs are still the holders of said check; that no part thereof has been paid, and that there is still due and owing from the defendant to plaintiffs on account thereof the sum of \$5.00 and interest thereon at the rate of 8% per annum from December 24th, 1919.

And for a twenty-third cause of action against the said defendant, H. W. Reeth, these plaintiffs allege:

1. That at all the times herein mentioned the plaintiffs were and are now copartners, engaged in a general mercantile business at Bethel in the Fourth Division of Alaska, under the firm name and style of Felder, Gale and Company; that during said time the defendant, H. W. Reeth was engaged in mining near Bethel, aforesaid, and was and is now a resident of the Fourth Division of Alaska.

2. That on or about the 2d day of January, 1920, at Bethel aforesaid, the said defendant made, executed and delivered to one George Smith, his certain check for the sum of Fifty-five Dollars, of which said check, the following is a copy, to wit:

THE SCANDINAVIAN AMERICAN BANK
19-8.

Member Federal Reserve Bank.

Bethel, Alaska,

~~Seattle, Washington,~~

Jan. 2d, 1920 No. 1

Pay to the order of George Smith \$55.00—Fifty-five Dollars.

H. W. REETH.

said check being for wages due from said Reeth to said Geo. Smith.

3. That the said George Smith thereafter endorsed his name upon the said check and delivered the same to these plaintiffs for value and in the ordinary course of business; that plaintiffs accepted the same for value and in good faith and thereupon became the holders thereof in due course.

4. That these plaintiffs endorsed said check and as soon as possible thereafter presented the same for payment to the Drawee therein named, to wit: the Scandinavian American Bank, at its place of business at Seattle in the State of Washington, but the said bank refused to pay the said check for the reason that the said defendant did not have sufficient funds in said bank with which to pay the same. That the said bank returned said check to plaintiffs, marked N. S. F.

5. That plaintiffs are still the holders of the said check; that no part thereof has been paid and that there is still due and owing from the said defendant to plaintiffs on account thereof the sum of \$55.00 and interest thereon at the rate of 8% per annum from the 2d day of January, 1920. [17]

For a twenty-fourth cause of action against the said defendant, H. W. Reeth, these plaintiffs allege:

1. That at all the times mentioned herein, the plaintiffs were, and are now copartners, engaged in a general mercantile business at the town of Bethel in the Fourth Division of Alaska, under the firm name and style of Felder, Gale and Company.

That during said times the defendant H. W. Reeth was engaged in mining near Bethel, aforesaid, and was and is now a resident of the Fourth Division of Alaska.

That on or about the 2d day of January, 1920, the said defendant, at Bethel, aforesaid, made, executed and delivered to one George Smith, his certain check for the sum of \$6.25, of which said check the following is a copy, to wit:

THE SCANDINAVIAN AMERICAN BANK
19-8.

Member Federal Reserve Bank,

Bethel, Alaska,

~~Seattle, Washington,~~
Jan. 2nd, 1920 No. 2.

Pay to the order of George Smith \$6.25—Six
25/100 Dollars.

H. W. REETH.

said check being given for wages due from said Reeth to said G. Smith.

3. That the said George Smith thereafter endorsed his name on said check and delivered the same to these plaintiffs for value and in the ordinary course of business; that plaintiffs accepted the said check for value and in good faith, and thereupon became the holders of said check in due course.

4. That plaintiffs as soon as possible thereafter endorsed said check and presented the same for payment to the Drawee therein named, to wit: the Scandinavian American Bank, at its place of business in Seattle in the State of Washington, but that

the said bank refused to pay the said check for the reason that the defendant did not have sufficient funds in said bank with which to pay the same. That the said bank returned said check to plaintiffs, marked N. S. F.

5. That plaintiffs are still the holders of the said check; that no part thereof has been paid and that there is still due and owing from the defendant to plaintiffs on account thereof the sum of Six Dollars and Twenty-five Cents and interest thereon at the rate of 8% per annum from January 2d, 1920.

And for a twenty-fifth cause of action against the said defendant, plaintiffs allege:

1. That at all the times herein mentioned, plaintiffs were and are now copartners, engaged in a general mercantile business at the town of Bethel in the Fourth Division of Alaska, under the firm name and style of Felder, Gale and Company; that during said time the said defendant H. W. Reeth was engaged in mining near Bethel, aforesaid, and was and is now a resident of the Fourth Division of Alaska.

2. That on or about January 3d, 1920, at Bethel aforesaid, the said defendant made, executed and delivered to one R. Rhodes, his certain check for the sum of Five Dollars, of which said check the following is a copy, to wit: [18]

THE SCANDINAVIAN AMERICAN BANK
19-8.

Member Federal Reserve Bank.

Bethel, Alaska, ~~Seattle, Washington,~~
Jan. 3d, 1920 No. 3.

Pay to the order of R. Rhodes \$5.00—Five Dollars.

H. W. REETH.

said check being for wages due from said Reeth to the said R. Rhodes.

3. That the said H. Rhodes thereafter endorsed his name upon the said check and delivered the same to these plaintiffs for value and in the ordinary course of business; that plaintiffs accepted the same for value and in good faith, and thereupon became the holders thereof in due course.

4. That plaintiffs as soon as possible thereafter, endorsed said check and presented the same for payment to the Drawee therein named, to wit: the Scandinavian American Bank, at its office in Seattle, in the State of Washington, but that said Bank refused to pay the said check for the reason that the defendant did not have sufficient funds in the said bank to pay the same; that said bank returned the said check to plaintiffs marked N. S. F.

5. That plaintiffs are still the holders of the said check; that no part thereof has been paid and that there is still due and owing from the defendant to these plaintiffs the sum of \$5.00 and interest thereon from the 3d day of January, 1920.

And for a twenty-sixth cause of action against the said defendant, plaintiffs allege:

1. That at all the times herein mentioned plaintiffs were and are now copartners, engaged in a general mercantile business at Bethel, Alaska, under the firm name and style of Felder, Gale and Company. That during said time the defendant H. W. Reeth was engaged in mining near Bethel, aforesaid, and was and is now a resident of the Fourth Division of Alaska.

2. That on or about the 6th day of January, 1920, at Bethel, aforesaid, the said defendant, made, executed and delivered his certain check to these plaintiffs for the sum of \$89.25, of which said check the following is a copy, to wit:

THE SCANDINAVIAN AMERICAN BANK
19-8.

Member Federal Reserve Bank.

Bethel, Alaska, Seattle, Washington,
Jan. 6th, 1920. No. 5.

Pay to the order of Felder and Gale \$98.25—
Eighty-nine 25/100 Dollars.

H. W. REETH.

3. That these plaintiffs accepted the said check for and at its face value, in good faith, and in the ordinary course of business; that plaintiffs duly endorsed the said check and as soon as possible presented the same for payment to the drawee therein named, to wit: the Scandinavian American Bank, at its place of business at Seattle, in the State of

Washington, but that said bank refused to pay the said check for the reason that the defendant did not have sufficient funds in said bank with which to pay the same. That said bank returned the said check to plaintiffs, marked N. S. F. [19]

4. That plaintiffs are still the holders of the said check; that no part thereof has been paid; that there is still due and owing from the defendant to plaintiffs on account thereof the sum of \$89.25 and interest thereon from the 6th day of January, 1920, at the rate of 8% per annum.

And for a twenty-seventh cause of action against the said defendant, H. W. Reeth, these plaintiffs allege:

1. That at all the times mentioned herein, these plaintiffs were and are now copartners, engaged in a general mercantile business at Bethel, Alaska, under the firm name and style of Felder, Gale and Company. That during said time, the defendant H. W. Reeth was engaged in mining at Golden Gate Falls, near Bethel, Alaska, and was and is now a resident of the Fourth Division of Alaska.

2. That between the first day of June, 1919, and the 2d day of June, 1920, at the special instance and request of the said defendant, one August Berg performed 2,450 hours labor on the mining claims of said defendant, for which said labor the said defendant promised and agreed to pay the said August Berg at the rate of Fifty Cents per hour. That by reason of such labor there became due from the said defendant to the said August Berg the sum

of \$1,225.00. That the said defendant paid to the said August Berg the sum of \$302.75 and no more, and there remained due and owing to the said August Berg on account thereof the sum of \$922.00.

3. That thereafter, for a good and valuable consideration, the said August Berg assigned and transferred his said account to these plaintiffs, and these plaintiffs are now the owners thereof. That plaintiffs made demand upon the said defendant H. W. Reeth for the payment thereof, but no part of said account has been paid, and that there is due and owing from the defendant to these plaintiffs on said account, the sum of \$922.00 and interest thereon at the rate of 8% per annum from the 2d day of June, 1920.

And for a twenty-eighth cause of action against the said defendant, plaintiffs allege:

1. That at all the times herein mentioned, plaintiffs were, and are now copartners, engaged in a general mercantile business at Bethel, Alaska, under the firm name and style of Felder, Gale and Company. That during said time the defendant H. W. Reeth was engaged in mining at Golden Gate Falls, near Bethel, aforesaid, and was and is now a resident of the Fourth Division of Alaska.

2. That between the first day of July, 1919, and the 3d day of June, 1920, at the special instance and request of the defendant H. W. Reeth, one Louis Nelson performed labor as cook on the mining claims of the said defendant, and for which labor the said defendant promised and agreed to pay the

said Louis Nelson at the rate of \$150.00 per month. That the said Nelson worked 10 months 41½ days and by reason thereof there became due and owing from the said defendant H. W. Reeth to the said Louis Nelson the sum of \$1,522.00. No part of which has been paid. [20]

3. That thereafter, the said Louis Nelson, for a good and valuable consideration, assigned and transferred all of his right, title and interest in and to said account to these plaintiffs, and that these plaintiffs are now the owners of the same. That plaintiffs made the demand upon the said defendant for the payment of the said account, but that the defendant has failed and neglected to pay the same. That no part of said account has been paid and there is still due and owing from the said defendant to these plaintiffs on account thereof the full sum of \$1,522.00 and interest thereon at the rate of 8% per annum from June 2d, 1920.

WHEREFORE plaintiffs pray judgment against the said defendant, H. W. Reeth, as follows:

1. On their first cause of action in the sum of \$507.50 and interest thereon at the rate of 8% per annum from December 31, 1920.

2. On their second cause of action, the sum of \$225.00 and interest thereon at the rate of 8% per annum from July 28, 1919.

3. On their third cause of action, the sum of \$179.95 and interest thereon at the rate of 8% per annum from August 12, 1919, together with damages and attorneys fees as provided by law.

4. On their fourth cause of action, the sum of \$10.00 and interest thereon at the rate of 8% per annum from August 12, 1919, together with damages and attorneys fees as provided by law.

5. On their fifth cause of action, the sum of \$80.00 and interest thereon at the rate of 8% per annum from August 27, 1919, together with damages and attorneys fees as provided by law.

6. On their sixth cause of action, the sum of \$18.00 and interest thereon at the rate of 8% per annum from August 27, 1919, together with damages and attorneys fees as provided by law.

7. On their seventh cause of action, the sum of \$266.50, and interest thereon at the rate of 8% per annum from August 27, 1919, together with damages and attorneys fees as provided by law.

8. On their eighth cause of action, the sum of \$155.00 and interest thereon at the rate of 8% per annum from August 27, 1919, together with damages and attorneys fees as provided by law.

9. On their ninth cause of action, the sum of \$10.00 and interest thereon at the rate of 8% per annum from August 27, 1919, together with damages and attorneys fees as provided by law.

10. On their tenth cause of action, the sum of \$150.00 and interest thereon at the rate of 8% per annum from August 28, 1919, together with damages and attorneys fees as provided by law.

11. On their eleventh cause of action, the sum of \$180.00 and interest thereon at the rate of 8% per annum from August 28, 1919, together with damages and attorneys fees as provided by law.

12. On their twelfth cause of action, the sum of \$9.10 and interest thereon at the rate of 8% per annum from August 28, 1919, together with damages and attorneys fees as provided by law. [21]

13. On their thirteenth cause of action, the sum of \$50.00 and interest thereon at the rate of 8% per annum from September 7, 1919, together with damages and attorneys fees as provided by law.

14. On their fourteenth cause of action, the sum of \$221.50, and interest thereon at the rate of 8% per annum from October 5, 1919, together with damages and attorneys fees as provided by law.

15. On their fifteenth cause of action, the sum of \$231.50, and interest thereon at the rate of 8% per annum from October 5, 1919.

16. On their sixteenth cause of action, the sum of \$10.00 and interest thereon at the rate of 8% per annum from October 25, 1919, together with damages and attorneys fees as provided by law.

17. On their seventeenth cause of action, the sum of \$200.00 and interest thereon at the rate of 8% per annum from October 25, 1919, together with damages and attorneys fees as provided by law.

18. On their eighteenth cause of action, the sum of \$75.00, and interest thereon at the rate of 8% per annum from October 25, 1919, together with damages and attorneys fees as provided by law.

19. On their nineteenth cause of action, the sum of \$25.00 and interest at the rate of 8% per annum from October 25, 1919, together with damages and attorneys fees as provided by law.

20. On their twentieth cause of action, the sum of \$7.00, and interest thereon at the rate of 8% per annum from November 9, 1919, together with damages and attorneys fees as provided by law.

21. On their twenty-first cause of action, the sum of \$186.85, and interest thereon at the rate of 8% per annum from November 14, 1919.

22. On their twenty-second cause of action, the sum of \$5.00, and interest thereon at the rate of 8% per annum from December 24, 1919, together with damages and attorneys fees as provided by law.

23. On their twenty-third cause of action, the sum of \$55.00, and interest thereon at the rate of 8% per annum from January 2, 1920, together with damages and attorneys fees as provided by law.

24. On their twenty-fourth cause of action, the sum of \$6.25, and interest thereon at the rate of 8% per annum from January 2, 1920, together with damages and attorneys fees as provided by law.

25. On their twenty-fifth cause of action, the sum of \$5.00, and interest thereon at the rate of 8% per annum from January 3, 1920, together with damages and attorneys fees as provided by law.

26. On their twenty-sixth cause of action, the sum of \$89.25, and interest thereon at the rate of 8% per annum from January 6, 1920.

27. On their twenty-seventh cause of action, the sum of \$922.25, and interest thereon at the rate of 8% per annum from June 2, 1920, together with damages and attorneys fees as provided by law.

28. On their twenty-eighth cause of action, the sum of \$1,522.00, and interest thereon at the rate of

8% per annum from June 2, 1920, and for damages and attorneys fees as provided by law.

29. For costs and disbursements of this action.

ALBRECHT and TAYLOR,
Attorneys for Plaintiffs. [22]

United States of America,
Territory of Alaska,
Fourth Division,—ss.

J. W. Felder, being first duly sworn on oath, says: I am one of the members of the firm of Felder, Gale and Company, and one of the plaintiffs in the above-entitled action; that I have read the foregoing complaint and know the contents thereof, and that the same is true, as I verily believe.

J. W. FELDER.

Subscribed and sworn to before me this 1 day of September, 1923.

[Seal]

L. E. BONHAM,
U. S. Commissioner. [23]

[Endorsed]: Filed Aug. 4, 1924.

[Title of Court and Cause—No. 460—I.]

ANSWER AND COUNTERCLAIM.

The defendant, for his answer and counterclaim to all of the twenty-eight causes of action set forth in the complaint of the plaintiffs, except the twenty-seventh cause of action, alleges and states:

I.

That for several years last past the defendant has been engaged in mining at a point called Golden Gate Falls, on the Riglugalic River, a tributary of the Kuskokwim River, and about one hundred miles up the Kuskokwim and Riglugalic Rivers from Bethel; that to enable him to successfully carry on his mining operations at the said Golden Gate Falls it was necessary for him to purchase and have hydraulic mining machinery, and in view of that in the year 1919 he purchased from the Bethlehem Shipbuilding Corporation, Ltd., of San Francisco, California, a hydraulic mining [25] outfit, of which the following is a description with the price paid for the different articles, to wit:

600 ft. 12" pipe)	
400 ft. 10" pipe)	
200 ft. 8" pipe)	\$1153.80
3 8" 90 deg. elbows)	
3 10" 90 deg. elbows)	
1 12" to 10" reducer)	
1 10" to 8" outlet)	140.20
2 No. 1 giants	250.00
2 Reflectors	80.00
1 Stationary Fairbanks-Morse 3 Horse	
Power gasoline engine	125.00
1 Twenty feet Grawel elevator	150.00
5 Wheelbarrows	40.00
6 Tops or baskets)	
2 Bars of $\frac{7}{8}$ inch drill steel	16.00
<hr/>	
Total	\$1955.00

which various sums of money he paid to the selling company in full for said machinery and equipment; that thereafter, and in the summer of 1920, said selling company shipped said machinery and equipment to the defendant in Alaska, delivering the same to him at Bethel, and from that point defendant started to convey the said machinery and equipment to his mining camp at Golden Gate Falls, but by reason of lack of water in the said Riglugalic River he was compelled to, and did, cache the same at an Indian village on the said river which he has called, and will call in this answer, "Supply Camp," which is about fifty miles down the said river from Golden Gate Falls and about *forth* miles up the Kuskokwim and Riglugalic *River* from Bethel; that he placed said machinery and equipment at said "Supply Camp" in a tent, which fully protected them from the weather, and placed watchmen in care thereof; that it was impossible for him to move said machinery to his mining plant during [26] the seasons of 1919, 1920 and 1921, by reason of low water in said Riglugalic River, and in consequence the said mining machinery and equipment remained at the said "Supply Camp"; that the defendant was compelled to, and did in fact, pay out of his own moneys for freight on the said mining machinery and equipment as follows:

Freight charges from San Francisco to Seattle	\$ 130.00
Freight charges from Seattle to Bethel...	390.00
Freight charges from Bethel to said "Supply Camp"	525.00
<hr/>	
Total freight charges.....	\$1045.00

making a total expenditure by him on account of said machinery and equipment and freight of \$3000.00.

II.

That at some time during the summer of 1921 the plaintiffs, without the knowledge or consent of the defendant, wrongfully and unlawfully went to the said "Supply Camp" and took possession of all of said mining machinery and equipment and transported the same down the said rivers to Bethel, and thereafter converted all of the same to their own use and benefit, sold part or all thereof, and thereby deprived this defendant of his possession and use and benefit of the whole thereof.

III.

That defendant elects to waive the tort involved in the said unlawful taking and conversion of said property and to rely upon an implied contract upon the part of the plaintiffs, created by the law, to pay him the said sum of \$3,000.00 for said machinery and equipment, the same being the amount expended by him therefor by the time it reached [27] the "Supply Camp"; that the said plaintiffs, by reason of the premises, impliedly agreed, and in

law did agree, to pay him the said sum of \$3,000.00 for the said machinery and equipment.

IV.

That in the summer of 1921 this defendant was the owner of the following described machinery which was located at Bethel, Alaska, upon which he had paid the sum of \$50.00, to wit:

12 Riv. & punch stakes.

That during the summer of 1921 the plaintiffs wrongfully and unlawfully converted the last described machinery to their own use and wholly deprived him of possession or use or benefit thereof; that he chooses to and does waive the tort committed by plaintiffs with reference to said last described machinery and will rely upon their implied promise to repay him the said \$50.00 which he had paid toward the purchase price thereof; that by reason of the premises the plaintiffs agreed to pay him the said \$50.00.

V.

That the plaintiffs have never paid this defendant any part of the said sum of \$3,000.00 and the further sum of \$50.00, and the said amounts, together with eight per cent per annum interest thereon from the 1st day of July, 1921, are now due to him from the plaintiffs and are wholly unpaid.

The defendant, for a counterclaim to the twenty-seventh cause of action stated in the complaint, which has reference to a labor bill of one August Berg for \$922.00, alleges and states: [28]

I.

That in the month of July, 1920, he was the owner of a gasoline launch called the "Virgingia" and a poling boat belonging with said gasoline launch, the said gasoline launch being of the value of \$1,100.00 and the poling boat \$150.00; that on July 3, 1920, he leased the said gasoline launch and poling boat to W. A. Munk, August Berg and A. J. Holmlund, and at that time advanced to the parties last mentioned, one hundred gallons of gasoline of the value of \$90.00, which they agreed to pay for; that the said August Berg mentioned in the said lease is the same August Berg that is referred to in the said twenty-seventh cause of action in the plaintiffs' complaint; that by the terms of said lease the said three men last named were to operate the said gasoline launch and poling boat in the carrying of freight and passengers on the Kuskokwim River and its tributaries, and were to share equally with the defendant in the profits of said enterprise; that afterwards, and in the winter of 1921 and 1922, the said W. A. Munk, August Berg and A. J. Holmlund wrongfully and unlawfully converted the said gasoline launch, poling boat and 100 gallons of gasoline to their own use and deprived this defendant of his possession and use and benefit thereof; that this defendant chooses and does waive the tort and the wrong committed by them with reference to the said launch and boat and the hundred gallons of gasoline furnished with the said launch and boat, and relies upon the implied promise upon their part to pay him the said

sums of money on account thereof; that by reason of the premises the said three persons named above as lessees, and especially said August Berg, severally agreed to pay him for said launch and boat and gasoline the sum of \$1,340.00; which said amount, together [29] with eight per cent per annum interest from the 1st day of March, 1922, is due and owing defendant from the said August Berg and has never been paid, or any part of it.

WHEREFORE, the defendant prays the judgment of this Court,

First. That the said sum of \$3,050.00 be set off and counterclaimed as against claims made by plaintiffs in all of their causes of action other than the twenty-seventh.

Second. That the plaintiffs take nothing on account of their cause of action number twenty-seven involving a labor bill of the said August Berg.

Third. That the plaintiffs have judgment upon their cause of action other than the twenty-seventh for the sum of \$1,430.65, with the interest thereon, as claimed by plaintiffs in their complaint.

LOUIS K. PRATT,
Attorney for Defendant.

United States of America,
Territory of Alaska.

H. W. Reeth, being first duly sworn, on oath says: That I am the defendant in the above-entitled cause, that I have read the foregoing answer and counterclaim, know the contents thereof, and that the same is true as I verily believe.

H. W. REETH.

Subscribed and sworn to before me this 4th day of August, 1924.

[Seal]

LOUIS K. PRATT,

Notary Public for Alaska.

My commission expires June 25th, 1928.

Service of the foregoing answer and counterclaim accepted this 4 day of August, 1924.

ALBRECHT and TAYLOR,

Attorneys for Plaintiff. [30]

[Endorsed]: Filed Aug. 6, 1924.

[Title of Court and Cause—No. 460—I.]

DEMURRER TO ANSWER AND COUNTER-CLAIM.

The plaintiffs demur to the defendant's answer and counterclaim to all of the twenty-eight *cause* of action set forth in the complaint of the plaintiff, except the twenty-seventh cause of action, for the reason and upon the grounds that the said answer and counterclaim does not state facts sufficient to constitute a defense to plaintiff's complaint.

Plaintiffs also demur to defendants answer and counterclaim to the twenty-seventh cause of action stated in the complaint, upon the ground and for the reason that said answer and counterclaim does not state facts sufficient to constitute a defense to plaintiff's complaint.

ALBRECHT and TAYLOR,

Attorneys for Plaintiffs.

Received copy of above demurrer this 6th day of August, 1924.

LOUIS K. PRATT,
Attorney for Defendant. [31]

[Title of Cause—No. 460-I.]

ORDER SUSTAINING AND OVERRULING
DEMURRER.

Now, on this day, the hearing on plaintiff's demurrer herein was resumed.

Argument to the Court was resumed by counsel and the Court being fully and duly advised in the premises,—

IT IS ORDERED, that plaintiff's demurrer to defendant's answer and counterclaim herein be, and the same is hereby, overruled as to first section and sustained as to second section.

Aug. 14, 1924.

Entered in Court Journal No. 3, page 419, at Flat.
[32]

[Endorsed]: Filed Aug. 20, 1924.

[Title of Court and Cause—No. 460-I.]

SECOND AMENDED ANSWER AND COUNTERCLAIM.

The defendant, for his second amended answer and counterclaim to all the twenty-eight causes of

action set forth in the complaint of the plaintiffs, alleges and states:

I.

That prior to the year 1919 the defendant went to a point called Golden Gate Falls, on the Riglugalic River, a tributary of the Kuskokwim River, about 90 miles up the Kuskokwim and Riglugalic Rivers from Bethel, Fourth Judicial Division, Territory of Alaska, and engaged in mining, and to that end commenced acquiring, by location and purchase, mining claims at Golden Gate Falls, in the said Riglugalic River, and its tributaries; that up to 1919 defendant had located and acquired title to about 1,200 acres of placer mining ground at said point, all of which was contiguous mining ground.

II.

That to enable him to successfully carry on his [33] mining operations at the said Golden Gate Falls it was necessary for him to purchase and have hydraulic mining machinery, and in view of that in the year 1919 he purchased from the Bethlehem Shipbuilding Corporation, Ltd., of San Francisco, California, and acquired the title to a hydraulic mining plant, of which the following is a description:

- 600 ft. 12" pipe
- 400 ft. 10" pipe
- 200 ft. 8" pipe
- 3 8" 90 deg. elbows
- 3 10" 90 deg. elbows
- 1 12" to 10" reducer
- 1 10" to 8" outlet

- 2 No. 1 giants
- 2 Reflectors
- 1 Stationary Fairbanks-Morse 3-Horse Power gasoline engine
- 1 Twenty feet Grawel elevator
- 5 Wheelbarrows
- 6 Tops of baskets
- 2 Bars of $\frac{7}{8}$ inch drill steel

That thereafter, and in the summer of 1290, said selling company shipped said machinery and equipment to the defendant in Alaska, delivering the same to him at Bethel, and from that point defendant started to convey the said machinery and equipment to his *ming* camp at Golden Gate Falls, but by reason of lack of water in the said Riglugalic River and transportation facilities thereon he was compelled to, and did, cache the same at an Indian village on the said river which he has called, and will call in this answer, "Supply Camp," which is about 40 miles down the said river from Golden Gate Falls and about 50 miles up the Kuskokwim and Riglugalic *River* from Bethel; that he placed said machinery and equipment at said "Supply Camp" in a tent, which fully protected them from the weather, and placed watchmen in care thereof; that it was impossible for him to move said machinery to his mining plant during the seasons of 1919, 1920 and 1921 by reason of [34] low water in said Riglugalic River, and in consequence the said mining machinery and equipment remained at the said "Supply Camp"; that the defendant was compelled to, and did in fact, pay out of his own moneys

for freight on the said mining machinery and equipment as follows:

Freight charges from San Francisco to Seattle	\$ 130.00
Freight charges from Seattle to Bethel	390.00
Freight charges from Bethel to said "Supply Camp"	525.00
<hr/>	
Total freight charges	\$1045.00

That under the conditions then existing at said Golden Gate Falls and "Supply Camp" the said mining machinery and equipment was reasonably worth to defendant and were of the value to him of \$10,000.00.

III.

That at some time during the summer of 1921 the plaintiffs, without the knowledge or consent of the defendant, wrongfully and unlawfully went to the said "Supply Camp" and took possession of all of said mining machinery and equipment and transported the same down the said rivers to Bethel, and thereafter converted all of the same to their own use and benefit, sold part or all thereof, and thereby deprived this defendant of his possession and use and benefit of the whole thereof.

IV.

That defendant elects to waive the tort involved in the said unlawful taking and conversion of said property and to rely upon an implied contract upon the part of the plaintiffs, created by the law, to pay him the said sum of \$10,000.00 for said ma-

chinery and equipment, the same being the reasonable value therefor by the time it reached the [35] "Supply Camp"; that the said plaintiffs, by reason of the premises, impliedly agreed, and in law did agree, to pay him the said sum of \$10,000.00 for the said machinery and equipment.

V.

That in the summer of 1921 this defendant was the owner of the following described machinery which was located at Bethel, Alaska, of the value of \$200.00, to wit:

No. 12 riveting machine with dies and punch stakes.

That during the summer of 1921 the plaintiffs wrongfully and unlawfully converted the last described machinery to their own use and wholly deprived him of possession, use and benefit thereof; that he chooses to and does waive the tort committed by plaintiffs with reference to said last described machinery and will rely upon their implied promise to pay him the value thereof; that by reason of the premises the plaintiffs agreed to pay him the said sum of \$200.00.

VI.

That the plaintiffs have never paid this defendant any part of the said sums of \$10,000.00 and the further sum of \$200.00, and the said amounts, together with eight per cent per annum interest thereon from the 1st day of July, 1921, are now due to him from the plaintiffs and are wholly unpaid.

VIII.

That defendant has compelled to and has in fact employed an attorney to defend him in this action, whose fees in that behalf are reasonably worth the sum of \$500.00.

WHEREFORE, the defendant prays the judgment of this [36] court.

First. That the said sum of \$10,200.00 be set off and counterclaimed as against the claims made by plaintiffs in all of their causes of action.

Second. That the plaintiffs take nothing on account of their complaint.

Third. That defendant have judgment against the plaintiffs on his counterclaim in the sum of \$4,797.35, together with interest thereon at the rate of eight per cent per annum from July 1st, 1921.

Fourth. For his costs, disbursements and attorney's fee.

LOUIS K. PRATT,
Attorneys for Defendant.

United States of America,
Territory of Alaska,—ss.

H. W. Reeth, being first duly sworn, on oath says: That I am the defendant in the above-entitled cause, that I have read the foregoing second amended answer and counterclaim, know the contents thereof, and that the same is true as I verily believe.

H. W. REETH.

Subscribed and sworn to before me this 19th day of August, 1924.

[Seal]

LOUIS K. PRATT,

Notary Public for Alaska.

My commission expires June 25, 1928.

Service of the foregoing second amended answer and counterclaim accepted this 19th day of August, 1924.

ALBRECHT and TAYLOR,

Attorneys for Plaintiffs. [37]

[Endorsed]: Filed Aug. 2, 1924.

[Title of Court and Cause—No. 460—I.]

MOTION TO STRIKE THE SECOND
AMENDED ANSWER AND COUNTER-
CLAIM OR TO REQUIRE DEFENDANT
TO SEPARATELY STATE THE DE-
FENSES THEREIN CONTAINED.

Come now the above-named plaintiffs by their attorneys, Messrs. Albrecht and Taylor, and move the Court for an order to strike from the files the second amended answer and counterclaim of the defendant, for the reason that the same contains several defenses which are not separately stated.

Or in the alternative that the defendant be required to separate and to plead said defenses in the manner required by law.

ALBRECHT and TAYLOR,

Attorneys for Plaintiffs.

Received copy of the above motion this 21st day of August, 1924.

LOUIS K. PRATT,
Attorney for Defendant. [38]

[Endorsed]: Filed Sep. 11, 1925.

[Title of Cause—No. 460—I.]

ORDER DENYING PLAINTIFF'S MOTION
TO STRIKE DEFENDANT'S SECOND
AMENDED ANSWER AND COUNTER-
CLAIM.

Now, on this day, this cause came on regularly for hearing on plaintiff's motion to strike the second amended answer and counterclaim or to require defendant to separately state the defenses therein contained; the plaintiff appearing by and through his counsel, Chas. E. Taylor, Esq., the defendant being represented by Louis K. Pratt, Esq.

Argument to the Court was had by respective counsel and the Court being fully and duly advised in the premises,—

IT IS ORDERED that the plaintiff's motion be and is hereby denied and he is granted ninety days in which to file reply.

CLERK'S NOTE.—To which plaintiff excepts and exception is allowed by the Court.

At 10:35 A. M. Court adjourned until 10:00 A. M. of Thursday, September 3, 1925.

District Judge. [39]

Entered in Court Journal #3, page 447, at Flat.

[Endorsed]: Filed Aug. 31, 1925.

Filed Sep. 11, 1925.

[Title of Court and Cause—No. 460—I.]

DEMURRER TO SECOND AMENDED ANSWER AND COUNTERCLAIM.

Comes now the above-named plaintiffs and through their attorneys, Messrs. Albrecht and Taylor, demur to the second amended answer and counterclaim of the defendant, for the reasons:

First. That this Court has no jurisdiction of the subject matter set up in said amended answer and counterclaim.

Second. That the said second amended answer and counterclaim does not state facts sufficient to constitute a defense to the plaintiff's complaint.

ALBRECHT and TAYLOR,
Attorneys for Plaintiffs.

Received copy of above demurrer this 31st day of August, 1925.

LOUIS K. PRATT,
Attorney for Defendant. [40]

[Endorsed]: Filed Feb. 20, 1926.

[Title of Cause—No. 460—I.]

ORDER OVERRULING PLAINTIFF'S DEMURRER TO DEFENDANT'S SECOND AMENDED ANSWER.

Now, on this day, this matter came on regularly for hearing on plaintiff's demurrer to defendant's

second amended answer, the plaintiff appearing by and through his counsel, Chas. E. Taylor, Esq., the defendant being represented by Louis K. Pratt, Esq.

Argument to the Court was had by respective counsel, and the Court being fully and duly advised in the premises,—

IT IS ORDERED, that the plaintiffs' demurrer to the second amended answer be and is hereby overruled, and plaintiff granted twenty (20) days in which to file reply.

Entered in Court Journal No. 16, page 481—Fairbanks.

Entered in Court Journal No. 3, page 451—Flat.
Feb. 1. 1926. [41]

[Endorsed]: Lodged Feb. 16, 1926.

Filed March 8, 1926, at Flat.

[Title of Court and Cause—No. 460-I.]

REPLY.

Come now the plaintiffs and for reply to the second amended answer and counterclaim of the defendant, allege:

1. That they have no knowledge or information as to the matters alleged in paragraph 1 thereof, and therefore deny the same.

2. They admit that the defendant caused a quantity of hydraulic pipe and equipment to be unloaded at a point on the Rigugalic River in the

Kuskokwim Precinct, Fourth Division of Alaska, but deny that the same was placed in a tent or under any cover whatsoever, and further deny that any person or persons were placed in charge thereof or to watch or care for the same. Plaintiffs deny each and every allegation contained in said paragraph 2 of said second amended answer and counterclaim, except as in this paragraph admitted.

3. Plaintiffs deny each and every allegation contained in paragraph III thereof.

4. That as to paragraph IV, plaintiffs deny that the sum of ten thousand dollars was or is a reasonable or fair value of the said hydraulic pipe and equipment mentioned in said paragraph, either at said Rigugalic River or elsewhere, or that it was worth any sum in excess of five hundred fifty dollars either at said Rigugalic River or at any other place in said Kuskokwim Precinct, and further deny that they ever agreed to pay the defendant for said pipe and equipment, either directly or by implication of law or in any manner whatsoever.

5. Plaintiffs admit that the defendant was and is the owner of the property mentioned in paragraph V of said second amended answer and counterclaim, but deny each and every other allegation contained in said paragraph.

6. Replying to paragraph VI thereof, plaintiffs deny that there is now or ever was any amount whatsoever due from plaintiffs to defendant. [42]

7. They deny each and every allegation contained in paragraph VIII thereof.

And as a further reply to said second amended answer and counterclaim, plaintiffs allege:

1. That from about the month of June, 1919, to the month of July, 1920, the defendant was engaged in mining at Golden Gate Falls on the Righgalic River in the Kuskokwim Precinct, 4th Division of Alaska.

3. That before entering upon such work, the defendant came to plaintiffs' store at Bethel, Alaska, and desired credit from them; that they should furnish him with goods, merchandise and supplies to enable him to carry on such work, and then and there represented to plaintiffs that he had considerable good and valuable mining ground at said Golden Gate Falls and that he was desirous of working and operating the same; that he was about to send outside and have shipped in a good and sufficient hydraulic plant and equipment for such operations and that he had sufficient available funds in the Scandinavian American Bank at Seattle, Washington; that he then and there offered the said mining property and the hydraulic plant and equipment for such credit, and then and there informed plaintiffs that they would run no risk in extending such credit and cashing his checks as they would have ample security therefor in said property and equipment mentioned by him.

3. That relying on such representations of the defendant and upon such security so offered, plaintiffs thereupon agreed to extend such credit to defendant and to cash his checks on said Seattle Bank, and the defendant thereupon entered upon

his said mining operations, and employed ten men or more to carry on the same. That plaintiffs furnished and supplied defendant with all of the goods, merchandise and supplies necessary to maintain his camp at said Golden Gate Falls and to carry on his said work thereat and cashed all of the checks given by the defendant to his said employees for their labor, the said checks being drawn on said Scandinavian Bank at Seattle, Washington. That defendant also gave plaintiffs certain checks on said bank as part payment for said merchandise furnished him. That each and all of said checks were duly presented to said bank by plaintiffs and were by said bank returned to plaintiffs, unpaid, for the stated reason that the defendant did not have sufficient funds in said bank to meet said checks or any of them. That the merchandise so furnished and the checks so issued by defendant are the same identical items as those set forth and mentioned in the several causes of action in plaintiffs' complaint herein.

4. That as a result of the mining operations of the defendant on the said mining ground, there was not sufficient gold or other thing of value taken therefrom to pay plaintiffs any part of their account against defendant. That the said mining ground was and is valueless for mining purposes and was abandoned by the defendant and allowed to lapse under the laws requiring annual labor thereon. That said ground furnished no security whatsoever for plaintiffs' account. That the defendant has never made any effort to pay the plain-

tiffs for said supplies nor any part thereof, nor to pay any of the said checks so drawn by him and cashed by plaintiffs.

5. That during the early summer of 1920, the defendant caused to be shipped from the outside to Bethel, the whole of the property mentioned in paragraphs 2 and 5 of said second amended answer and counterclaim; that he left at Bethel, the property mentioned in said paragraph 5; that plaintiffs consented that the hydraulic pipe and equipment be shipped to Golden [43] Gate Falls aforesaid, to be there used by defendant in his mining operations. That instead of taking said pipe and equipment to said property, defendant caused the same to be unloaded on the banks of the Rigugalic River about forty miles from said Golden Gate Falls, and left the same on the bank of said river, near the edge thereof; uncovered and unprotected from and exposed to the elements; that it remained in such abandoned condition until the fall of the year 1921.

6. That in the fall of the year 1921, plaintiffs were informed that the Rigugalic River was running very high, and was rapidly washing away the bank thereof at the point where the said pipe and equipment were located, and that unless prompt action was taken to save the same, it would fall into the river and be lost. That thereupon and at considerable expense to themselves, plaintiffs sent up a boat and men from Bethel to the place where said pipe was located, and there found that the river was very high, and was washing the bank

from under said pipe and equipment. That the plaintiffs considered said pipe and equipment the only security they had for their account against defendant, as aforesaid, and to save said property from becoming a total loss, caused the same to be transported back to Bethel. That they immediately notified the defendant of their action and requested him to come to Bethel and make settlement and adjustment of the matters and things between them, including the saving of said property. That defendant ignored plaintiff's request and never came near them nor did he ever thereafter communicate with plaintiffs in any way. That the plaintiffs kept said pipe and equipment at the disposal of the defendant for over two years at Bethel aforesaid. That during said time there was no call or demand for the same, nor any opportunity to dispose of the same until in the fall of the year 1923 when they had a chance to dispose of the same for the sum of five hundred fifty dollars. That after notifying defendant, who never responded or came near plaintiffs, they disposed of said pipe and equipment to one Al. Walsh for said sum of \$550.00 which said sum was the full value of said property and all the same was worth in said Kuskokwim Precinct. That the amount realized from the sale of the said property was placed to the credit of the defendant on the books of plaintiff. That at no time since the arrival of said property at Bethel, aforesaid, has it had any value whatsoever, save and except a speculative value, in said community or Precinct.

7. That all other property belonging to defendant and known to plaintiffs, including the property mentioned in paragraph 5 of said second amended answer and counterclaim has been attached by the United States Marshal under a writ of attachment issued in this action, and is now in the possession of the said Marshal pending the result of this action.

Wherefore plaintiffs pray judgment against the defendant as prayed for in their complaint, less the amount of \$550.00 received for said pipe and equipment subsequently to the commencement of this action.

ALBRECHT and TAYLOR,
Attorneys for Plaintiffs. [44]

United States of America,
Territory of Alaska,
Fourth Division,—ss.

John W. Felder, being first duly sworn on oath, says: I am one of the plaintiffs in the above-entitled action; that I have read the foregoing reply and know the contents thereof, and that the same is true as I verily believe.

JOHN W. FELDER.

Subscribed and sworn to before me this 21st day of December, 1925.

[Seal]

F. C. WISEMAN,
Notary Public in and for Alaska.

My commission expires Jany. 17, 1927.

Received copy of foregoing reply this 15th day of Feby., 1926.

LOUIS K. PRATT,
Attorney for Defendant. [45]

[Title of Cause—No. 2889.]

TRIAL BY THE COURT.

Now on this day this cause came on regularly for trial, the plaintiffs appearing by and through John W. Felder, the defendant appearing also in person. The following proceedings were had, to wit:

H. W. Reeth, being first duly sworn, testified for and in behalf of the defendant.

Letter dated March 2d, 1908, George Otis Smith to H. W. Reeth, was duly offered, marked and admitted in evidence as Defendant's Exhibit 1.

Letter dated April 15, 1912, Alfred H. Brooks to H. W. Reeth, was duly offered, marked and admitted in evidence as Defendant's Exhibit 2.

Defendant rests.

Charles Linck and J. W. Felder being each first duly sworn testified for and in behalf of the plaintiff.

Deposition of John Frostland was read by the Court.

Plaintiffs rest.

At 3:05 P. M. the court adjourned until 10.00 o'clock A. M. of Wednesday, June 13th, 1928.

District Judge.

[Endorsed]: June 12, 1928.

Entered in Ruby Court Journal No. 2, page 25.

[46]

[Title of Cause—No. 2889.]

TRIAL BY THE COURT (RESUMED).

And now come the respective parties as heretofore, the trial of this cause was resumed.

H. W. Reeth, heretofore sworn, testified in rebuttal for and in behalf of the defendant.

Letter dated August 31st, 1918, J. H. Barrett to H. W. Reeth was duly offered, marked and admitted in evidence as Defendant's Exhibit 3.

Lead pencil sketch was duly offered, marked and admitted in evidence as Defendant's Exhibit 4.

Defendant rests.

J. W. Felder, heretofore sworn, testified in sur-rebuttal for and in behalf of the plaintiffs.

Plaintiffs rest.

Whereupon, pursuant to stipulation made and entered into by counsel for the respective parties, dated May 7th, 1928, this cause was transferred to Fairbanks.

[Endorsed]: Jun. 13, 1928.

Entered in Ruby Court Journal No. 2, page 28.

[47]

[Endorsed]: Filed May 7, 1928.

[Title of Court and Cause—Nos. 460—I—2889.]

STIPULATION RE TRIAL.

It is hereby stipulated between the parties hereto, by and through their respective counsel, that this action may be tried before the Court without a jury, at Bethel, Alaska, at any time the Court may sit there during the present year.

That neither counsel shall be present at the trial.

That each party shall present its own evidence with the assistance of the Court, who shall ask any and all questions that he may think proper to fetch out the truth, and who may call for further evidence upon any point not completely covered and clear.

That the defendant admits the truth of the plaintiff's complaint, and that it will only be necessary for the plaintiff to file as exhibits the checks enumerated in his complaint.

That the state of the pleadings having thrown the substantial affirmative upon the defendant he shall, after the formal opening, and filing of exhibits by the plaintiff have the burden of proving his counterclaim, and may, after plaintiff shall have introduced its evidence against such counterclaim, close the case in rebuttal.

That the complete proceedings before the Court shall be taken down by the court stenographer.

That arguments of counsel shall be had at the convenience of the Court and counsel after the return of the Court to Fairbanks.

That counsel for the defendant shall have the opening and closing of the argument.

Dated, Fairbanks, Alaska, May 7, 1928.

ALBRECHT and TAYLOR,
Attorneys for Plaintiffs.
LOUIS K. PRATT,
Attorney for Defendant. [48]

[Endorsed]: Lodged Aug. 22, 1928.

Filed Aug. 29, 1928.

[Title of Court and Cause—Nos. 460—I—2889.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Pursuant to the stipulation of the parties, as on file, this cause came on to be heard by the Court without a jury and in the absence of the attorneys for the respective parties, on the 12th and 13th days of June, 1928, at a Special Term of the said court held at Bethel, Fourth Judicial Division, Territory of Alaska. The evidence, produced by the parties themselves, was seen and heard by the Court upon the said days and, as provided for in said stipulation, oral argument was afterwards heard in open court at Fairbanks, on August 21, 1928, at which time the cause was argued upon behalf of the plaintiffs by George W. Albrecht, of the firm of Albrecht & Taylor, attorneys for plaintiffs, and by Louis K. Pratt, attorney for defendant. At the conclusion of the argument the Court announced its decision to the effect that the amounts

with accrued interest claimed by the plaintiffs in their complaint, was due them from the defendant, and that the allegations contained in the first four paragraphs of the defendant's second amended answer and counterclaim were true and that he was entitled to counterclaim as against said demand of plaintiffs the sum of \$8,000.00 with interest thereon at 8% per annum from September 1, 1921, and thereupon directed the defendant's attorney to prepare formal findings of fact and conclusions of law, which having been done are as follows: [49]

FINDINGS OF FACT.

From the evidence seen and heard in this case the Court finds the facts to be as follows:

I.

That the defendant became indebted to the plaintiffs upon the causes of action stated in their twenty-eight separate causes as set forth in their complaint, and he is now indebted to the plaintiffs upon the said causes of action with accrued interest, in the sum of \$8,690.21.

II.

That prior to August, 1921, the defendant became the owner by location and purchase of contiguous placer mining claims of an area of about 1,200 acres, located at Golden Gate Falls, on the Riglugalic River, a tributary of the Kuskokwim River, in the said Division and Territory, and up to that time had prepared the same for hydraulic mining by the construction of cabins, machine shop and other buildings, digging ditches, placing a dam across the

said river and clearing the ground of brush and was ready to commence open cut hydraulic mining thereon. That in 1919 the defendant purchased in San Francisco, California, a hydraulic mining plant, consisting of

- 600 ft. 12" pipe
- 400 ft. 10" pipe
- 200 ft. 8" pipe
- 3 8" 90 deg. elbows
- 3 10" 90 deg. elbows
- 1 12" to 10" Reducer
- 1 10" to 8" outlet
- 2 No. 1 Giants
- 2 Reflectors
- 1 Stationery Fairbanks-Morse 3-Horse Power Gasoline Engine
- 1 Twenty feet Grawel Elevator
- 5 Wheelbarrows
- 6 Tops of Baskets
- 2 Bars of $\frac{7}{8}$ inch drill steel

and in the summer of 1920 caused the same to be shipped from San Francisco, California, to Bethel, Alaska, and from there it was started for his mining ground at Golden Gate Falls on said Riglu-galic River, but owing to high water the boat transporting the same was [50] unable, by reason of the swift current, to get farther than a point called "Supply Camp" on the said river, which is about forty miles down river from the said Golden Gate Falls, and at that point the said machinery was taken from the boat and put on the bank and placed under a tent and in charge of a native Indian. That

in August, 1921, the plaintiffs employed one Tony Sumi to proceed with a power boat from Bethel to the said "Supply Camp" on the Riglugalic River and load the said machinery thereon and return it to Bethel, which the said Tony Sumi did and delivered the same to these plaintiffs who afterwards sold the same and kept the proceeds. That the action of the plaintiffs in taking the said machinery and disposing of it was without the knowledge or consent of the defendant, was unlawful, unjustifiable and oppressive and resulted in compelling the defendant to abandon his mining enterprise at Golden Gate Falls. That under the circumstances and conditions as they existed at that time and by reason of the fact that there was no market value for said machinery at that time and place, and by reason of the use that the defendant could have put it to, the said machinery was worth to him the sum of \$8,000.00 and he is entitled to counterclaim that amount with interest thereon at 8 per cent per annum from September 1, 1921, aggregating \$12,480.00 as against the debt owing by him to the plaintiffs.

CONCLUSIONS OF LAW.

The defendant H. W. Reeth, is entitled to recover of and from the plaintiffs the sum of \$3,789.79 and the costs and disbursements of the action.

Dated at Fairbanks, Alaska, this 29th day of August, 1928.

CECIL H. CLEGG,
District Judge.

Service of the foregoing findings of fact and conclusions of law by receipt of copy thereof admitted this 22d day of August, 1928.

ALBRECHT and TAYLOR,
Attorneys for Plaintiffs.

[Endorsed]: Entered in Court Journal No. 17,
page 306. [51]

[Endorsed]: Filed Aug. 25, 1928.

[Title of Court and Cause—No. 2889.]

PLAINTIFFS' OBJECTIONS TO DEFEND-
ANT'S PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW.

Comes now the plaintiffs and object and except to the proposed findings of fact and conclusions of law as prepared and served by Louis K. Pratt, Esq., attorney for the defendant.

1. They except to that part of the opening statement embraced in first page line 17 to second page line 2, reading as follows: "and that the allegations in the first four paragraphs of the defendant's second amended answer and counterclaim were true and that he was entitled to counterclaim as against said demand of plaintiffs," for the reason that said statement is not in accordance with the actual statement made by the Court which was that he would allow the defendant eight thousand dollars damages. And also for the reason that said statement is contradictory to the statements of findings No. II.

2. They except to all of findings No. II, for the reason that the same is intended to support the defendant's alleged counterclaim, which did not arise out of the contract or transaction set forth in the complaint as the foundation of the plaintiffs' claim; nor is it one arising on contract, but is purely a right of action in tort, and not allowable as a counterclaim under section 896 of the Compiled Laws of Alaska, or of any other law.

3. Plaintiffs object and except to the proposed conclusions of law, for the reason that said conclusions is not law, and is without basis or warrant in law.

ALBRECHT and TAYLOR,
Attorneys for Plaintiffs.

Received a copy of the above exceptions this twenty-fifth day of August, 1928.

LOUIS K. PRATT,
Attorney for Defendant.

The foregoing objections and exceptions are hereby overruled and denied, and exception allowed this 29th day of Aug., 1928.

CECIL H. CLEGG,
Judge. [52]

[Endorsed]: Filed Aug. 25, 1928.

[Title of Court and Cause—No. 2889.]

PLAINTIFFS' PROPOSED AMENDMENTS
TO THE DEFENDANT'S PROPOSED
FINDINGS OF FACTS AND CONCLU-
SIONS OF LAW.

The plaintiffs above named hereby propose the following amendments to the findings of fact and conclusions of law prepared, served, and filed by Louis K. Pratt, Esq., attorney for the defendant, to wit:

FINDINGS OF FACTS.

1. That at all the times mentioned in plaintiffs' complaint John W. Felder, Maurice A. Gale, George Schmidt, and Robert Gierke were copartners doing business as Felder, Gale & Co., and engaged in a general mercantile business at Bethel, Alaska.

2. That between the 2d day of February, 1920, and the 31st day of December, 1920, at Bethel, Alaska, the plaintiffs, at the special instance and request of the defendant, sold and delivered to the defendant certain goods, wares and merchandise for the agreed price of five hundred and seven dollars and fifty cents (\$507.50), as set forth in the plaintiffs' first cause of action, and as shown by the Plaintiffs' Exhibit "A"; and that no part thereof has ever been paid.

3. That between the 28th day of July, 1919, and the 6th day of June, 1920, the defendant made,

executed and delivered his certain checks, twenty-five in number and aggregating \$2,450.90, drawn on the Scandinavian-American Bank of Seattle; that the plaintiffs cashed all of said checks and duly presented them for payment, and that all of said checks were returned to the plaintiffs dishonored and that none of them have ever been paid, as is set forth in the plaintiffs' 2d to 26th causes of action, inclusive, and as is shown by the Plaintiffs' Exhibits "B1" to "B25," inclusive.

4. That between the first day of June, 1919, and the 2d day of June, 1920, at the special instance and request of the defendant one August Berg performed 2,450 hours of labor on the mining claims of the defendant, for which said labor the defendant then and there promised and agreed to pay the said August Berg at the rate of fifty cents per hour. That by reason of said labor there became due from the defendant to said August Berg the sum of \$1,225. That the defendant paid to said August Berg the sum of \$302.75, and no more, and that there remained due and owing to the said August Berg on account thereof the sum of \$922.25.

That thereafter for a good and valuable consideration the said August Berg assigned and transferred his said account to the plaintiffs, and that these plaintiffs are now the owners thereof. That the plaintiffs have made demand upon the defendant for payment thereof but that no part of said account has ever been paid; as is set forth in the plaintiffs' 27th cause of action, and as shown by the Plaintiffs' Exhibit "C."

5. That between the first day of July, 1919, and the 3d day of June, 1920, at the special instance and request of the defendant one Louis Nelson performed labor as cook on the mining claims of [53] the defendant, and for which labor the defendant then and there promised and agreed to pay to the said Louis Nelson at the rate of \$150 a month. That the said Louis Nelson so worked 10 months 41½ days, and by reason thereof there became due and owing from the defendant to the said Louis Nelson the sum of \$1,522, no part of which has ever been paid.

That thereafter the said Louis Nelson for a good and valuable consideration assigned and transferred said account to the plaintiffs, and that the plaintiffs are now the owners of the same.

That plaintiffs made due demand upon the defendant for payment of said account, but that defendant has not paid the same or any part thereof; as is set forth in the plaintiffs' 28th cause of action, and as is shown by the Plaintiffs' Exhibit "D."

6. That the plaintiffs, in the fall of 1921, and for the purpose of saving the same from being lost through falling to the Rigugalic River, took possession of a quantity of hydraulic pipe and other mining equipment, the property of the defendant, and held the same for about two years and then disposed of all the property for the sum of five hundred and fifty dollars (\$550), which amount the plaintiffs credited in account to the defendant.

CONCLUSIONS OF LAW.

1. That the defendant's alleged counterclaim is not one arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiffs' claim; nor is it one arising on contract, but is purely a right of action in tort, and is not allowable as a counterclaim under section 896 of the Compiled Laws of Alaska, or of any other law.

2. That taking into consideration the plaintiffs' 28 causes of action and the credit set forth in the plaintiffs' reply, together with interest thereon, there is now due and owing from the defendant to the plaintiffs the sum of eight thousand one hundred and ninety dollars and twenty-one cents (\$8,190.21); and that the plaintiffs are entitled to a judgment against the defendant for said sum, and for their costs and disbursements of this action.

ALBRECHT and TAYLOR,

Attorneys for Plaintiffs.

Received a copy of the above this twenty-fifth day of August, 1928.

LOUIS K. PRATT,

Attorney for Defendant.

The foregoing amendments are hereby overruled and denied and exception allowed this 29th day of August, 1928.

CECIL H. CLEGG,

Judge. [54]

[Endorsed]: Filed Aug. 31, 1928.

[Title of Court and Cause—No. 2889.]

MOTION FOR NEW TRIAL.

Come now the plaintiffs above named, and move this Honorable Court for an order setting aside the findings of facts and conclusions of law, and the judgment based thereon, heretofore found and given on the twenty-ninth day of August, 1928, and giving and granting to the plaintiffs a new trial of said action, upon the grounds following, to wit:

1. That the defendant's alleged counterclaim is not one arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiffs' claim.

2. That the said plaintiffs' claim is based upon contract, and the defendant's alleged counterclaim is not one arising on contract, but is purely a right of action in tort, and is not allowable as a counterclaim under section 896 of the Compiled Laws of Alaska, or of any other law.

3. Errors in law by admitting any evidence whatever to support the defendant's alleged counterclaim.

4. Insufficiency of the evidence to justify the judgment.

5. Error in law in pronouncing any judgment in favor of the defendant.

ALBRECHT and TAYLOR.

ALBRECHT and TAYLOR,

Attorneys for Plaintiffs.

Received copy of the above this thirty-first day of August, 1928.

LOUIS K. PRATT,
Attorney for Defendant. [55]

[Title of Cause—No. 2889.]

ORDER DENYING PLAINTIFFS' MOTION
FOR NEW TRIAL.

Now on this day, this matter came on for hearing on the plaintiffs' motion for new trial, the plaintiffs appearing by and through Geo. W. Albrecht, Esq., the defendant being represented by Louis K. Pratt, Esq.

Argument to the Court was had by respective counsel and the Court having heard the arguments and being fully and duly advised in the premises,—

IT IS ORDERED that the plaintiffs' motion for a new trial be, and is hereby, denied.

Oct. 6, 1928.

Entered in Court Journal No. 17, page 318. [56]

[Endorsed]: Filed Oct. 10, 1928.

In the District Court for the Territory of Alaska,
Fourth Judicial Division.

No. 2889.

JOHN W. FELDER, MAURICE A. GALE,
GEORGE SCHMIDT and ROBERT
GIERKE, Copartners, Doing Business as
FELDER, GALE and COMPANY,
Plaintiffs,

vs.

H. W. REETH,

Defendant.

JUDGMENT.

Now, at this time, to wit, August 21, 1928, the same being one of the days of the regular February, 1928, term of this court, this cause came on to be heard, on the complaint, second amended answer and counterclaim and reply, the evidence having previously been taken by the Court, in the absence of attorneys for either party, at a special term of said court, held in Bethel, Alaska, in the said Division, on the 12th and 13th days of July, 1928. The plaintiffs appeared by George W. Albrecht of the firm of Albrecht & Taylor, attorneys for plaintiffs, and argued the case on behalf of the plaintiffs, and Louis K. Pratt appeared on behalf of the defendant and argued the case in his behalf. At the conclusion of the arguments the Court announced its decision orally and directed the attorney for the

defendant to prepare formal findings of fact and conclusions of law and submit them to the Court for signature, which having been done, and the same having been signed by the Judge of the said court and filed with the papers in the cause, in accordance therewith,— [57]

IT IS CONSIDERED, ORDERED AND ADJUDGED by the Court that the defendant, H. W. Reeth have and recover from the plaintiffs, John W. Felder, Maurice A. Gale, George Schmidt and Robert Gierke, copartners, doing business as Felder, Gale and Company, the sum of three thousand seven hundred eighty-nine dollars and seventy-nine cents (\$3,789.79) and the costs and disbursements of the action, amounting to \$30.95, to be taxed by the Clerk of this court, for the collection of which let execution issue on demand of defendant or his attorney.

This judgment shall draw interest at the rate of eight (8%) per centum per annum from its date.

Dated at Fairbanks, Alaska, this 10th day of October
~~September~~, 1928.

CECIL H. CLEGG,
District Judge.

Received copy Oct. 6, 1928.

ALBRECHT and TAYLOR.

Entered in Court Journal No. 17, page 320. [58]

[Endorsed]: Filed Oct. 22, 1928.

[Title of Court and Cause—No. 2889.]

ORDER EXTENDING TIME TO AND INCLUDING DECEMBER 15, 1928, TO FILE BILL OF EXCEPTIONS.

This matter coming on regularly for hearing on the application of the plaintiffs above named for an extension of time within which to prepare, serve, and file a bill of exceptions in the above-entitled cause, and it appearing to this Court that good cause exists for extending the time within which to prepare, serve, and file a bill of exceptions based on the judgment rendered in said cause on the tenth day of October, 1928; and the Court being fully advised in the premises,—

IT IS ORDERED that the plaintiffs be, and they are hereby given and granted until and including the fifteenth day of December, 1928, within which to prepare, serve, and file their bill of exceptions based on the judgment of this Court entered in said cause October tenth, 1928.

Done at Fairbanks, Alaska, on this the nineteenth day of October, 1928.

CECIL H. CLEGG,
District Judge.

Entered in Court Journal No. 17, page 324. [59]

[Endorsed]: Filed Dec. 12, 1928.

[Title of Court and Cause—No. 2889.]

BILL OF EXCEPTIONS AND ASSIGNMENT
OF ERRORS.

Now on the 12th day of December, A. D. 1928, come the above-named plaintiffs John W. Felder, Maurice A. Gale, George Schmidt and Robert Gierke, copartners doing business as Felder, Gale and Company, by their attorneys, Messrs. Albrecht and Taylor, and say that the judgment entered in the above-entitled action on the tenth day of October, 1928, is erroneous and against the just rights of the said plaintiffs, for the following reasons, to wit:

1. The Court erred in denying the plaintiff's motion to strike from the files the defendant's second amended answer and counterclaim, or in the alternative that the defendant be required to separate and plead the defenses therein contained in the manner required by law, for the reason that the said second amended answer and counterclaim contains several defenses which are not separately stated.

2. The Court erred in overruling the plaintiff's demurrer to defendant's second amended answer and counterclaim for the following reasons.

(a) That this court has no jurisdiction of the subject matter set up in said answer and counterclaim; it not being a proper subject of counterclaim under the laws of Alaska.

(b) That said second amended answer and counterclaim does not state facts sufficient to constitute a defense to the plaintiff's complaint.

3. The Court erred in overruling paragraph 2 of plaintiff's objections to defendants proposed findings of fact and conclusions of law, wherein they objected to the whole of paragraph 2 of said proposed findings of fact because the said paragraph 2 of said proposed findings of fact is intended to support the defendant's alleged counterclaim, which did not arise out of the contract or transaction set forth in plaintiff's complaint; nor is it one arising on contract, but is purely [60] a right of action in tort, and not allowable as a counterclaim under the laws of Alaska.

4. The Court erred in finding as a fact the following statement contained in paragraph 2 of the findings of fact and conclusions of law filed herein, commencing at paragraph 2 thereof as follows:

“That prior to August, 1921, the defendant became the owner by location and purchase of contiguous placer mining claims of an area of about 1200 acres located at Golden Gate Falls, on the Rigugalic River, a tributary of the Kuskokwim River, in the said Division and Territory, and up to that time had prepared the same for hydraulic mining by the construction of cabins, machine shops and other buildings, diggong ditches, placing a dam across said river and clearing the ground of brush and was ready to commence open cut hydraulic mining thereon.”

for the reason that the same is irrelevant and immaterial, and is inserted as a foundation for damages in tort, which tort the said defendant has expressly waived in his answer, aforesaid.

5. The Court erred in finding as a fact the following statement contained in said paragraph 2 of the findings of fact aforesaid, commencing at the middle of line 18 thereof on page 3, and including the words "and in charge of a native Indian," for the reason that such finding is not supported by any evidence whatever, and is inserted as a further foundation for damages in tort.

6. The Court erred in finding as a fact that portion of said Section 2 of such findings, commencing on line 19 at page 3 thereof with the words;

"That in August, 1921, the plaintiffs employed one Tony Sumi to proceed with a power boat from Bethel to the said Supply Camp on the Riglugalic River and load the said machinery thereon and return it to Bethel, which the said Tony Sumi did and delivered the same to these plaintiffs who afterward sold the same and kept the proceeds. That the action of the plaintiffs in taking the said machinery and disposing of it was without the knowledge or consent of the defendant, was unlawful, unjustifiable and oppressive and resulted in compelling the defendant to abandon his mining enterprize at Golden Gate Falls."

for the reason that such allegation is inserted as a further foundation for damages in tort, and that

such tort is not a proper counterclaim to the plaintiff's complaint.

7. That the Court erred in refusing to find as a fact the plaintiff's proposed finding of fact No. 6 as set out in said proposed findings, as follows:

6. That the plaintiffs, in the fall of 1921, for the purpose of saving the same from being lost through falling into the Riglugalic River, took possession of a quantity of hydraulic pipe and other mining equipment, the property of the defendant, and held the same for about [61] two years and then disposed of all of the said property for the sum of five hundred and fifty dollars (\$550.00), which amount the plaintiff credited in account to the defendant."

for the reason that such allegation is a material fact and is supported by the evidence.

8. The Court erred in finding as a fact that certain allegation contained in paragraph 2 of the said findings of fact, commencing on line 29 of page 3 thereof and continuing as follows:

"That under the circumstances and conditions as they existed at that time and that by reason of the fact that there was no market value for the said machinery at that time and place, and by reason of the use that the defendant could have put it to, the said machinery was worth to him the sum of \$8000.00."

for the reason that the said finding is inserted as a further basis and foundation for damages in tort,

and that such tort is not a proper counterclaim to plaintiff's complaint.

9. The Court erred in finding as a fact that certain allegation commencing on line 34 of *page of* the findings of fact and conclusions of law aforesaid, and continuing as follows:

“and he is entitled to counterclaim that amount with interest thereon at 8% per cent per annum from September 1, 1921, as against the debt owing by him to plaintiffs.

for the reason that such damages sound in tort, and are not a proper counterclaim to plaintiff's complaint, and that such allegation is a conclusion of law.

10. That the Court erred in concluding as a matter of law that the defendant H. W. Reeth, is entitled to recover of and from the plaintiffs the sum of \$3,789.79 and the costs and disbursements of the action, for the reason that such conclusion is not warranted or sustained by the facts of the case, and that such amount is not a proper counterclaim against plaintiff's complaint, nor did it arise out of the same transaction sued upon by plaintiffs.

11. The Court erred in overruling the plaintiffs objections to said conclusion of law as set forth in Paragraph 3 of “plaintiff's objections to defendants proposed findings of fact and conclusions of law,” and which proposed findings and conclusions were thereafter adopted by the Court as the findings of this case.

12. The Court erred in refusing to allow and

adopt Paragraph 1 of plaintiffs proposed conclusions of law, as follows: [62]

“That the defendant’s alleged counterclaim is not one arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff’s claim; nor is it one arising on contract, but is purely a right of action in tort, and is not allowable as a counterclaim under Section 896 of the Compiled Laws of Alaska, or any other law.

for the reason that such proposed conclusion is the proper law governing this action.

13. The Court erred in refusing to allow and adopt Paragraph 2 of plaintiff’s proposed conclusions of law, as follows:

“That taking into consideration the plaintiff’s 28 causes of action and the credit set forth in plaintiff’s reply, together with interest thereon, there is now due and owing from the defendant to the plaintiffs the sum of eight thousand one hundred and ninety dollars and twenty-one cents (\$8190.21) and that the plaintiffs are entitled to a judgment against the defendant for said sum and for their costs and disbursements of this action.

for the reason that such conclusion of law is fully borne out by the pleadings, the evidence and is the proper law governing the case.

14. The Court erred in giving and entering judgment against the plaintiffs in this action, for the reason that the facts alleged in plaintiffs complaint are admitted by the defendant; that the counter-

claim set out in defendant's second amended answer and counterclaim did not grow or arise out of the same transaction, but is for damages in tort, and is not a proper subject of counterclaim under the laws of Alaska.

15. The Court erred in overruling plaintiff's motion for a new trial, for the reason that the pleadings in said action and the evidence adduced thereon and admitted by the Court to sustain the counterclaim of the defendant was not sufficient to justify a judgment in favor of the defendant, and that such judgment was erroneous in law as well as in fact.

ALBRECHT and TAYLOR,

Attorneys for Plaintiffs.

P. O. Address: Fairbanks, Alaska.

Due service of the foregoing bill of exceptions and assignment of errors admitted by receipt of a copy thereof this December 12, 1928.

LOUIS K. PRATT,

Attorney for Defendant. [63]

[Endorsed]: Filed Dec. 12, 1928.

[Title of Court and Cause—No. 2889.]

PETITION FOR APPEAL.

The above-named plaintiffs John W. Felder, Maurice A. Gale, George Schmidt and Robert Gierke, copartners doing business as Felder, Gale and Company, considering themselves aggrieved by the judgment of this Court made and entered in

this action on the 10th day of October, A. D. 1928, do hereby appeal from the said judgment to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified and set forth in the assignment of error, which is filed herewith and said plaintiffs and each of them pray that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said judgment was made, duly authenticated by the Clerk of this Court, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California.

Fairbanks, Alaska, December 12th, 1928.

ALBRECHT and TAYLOR,
Attorneys for said Plaintiffs.

Due service of the foregoing petition for appeal, and a copy thereof is hereby acknowledged this 12th day of December, 1928.

LOUIS K. PRATT,
Attorney for Defendant. [64]

[Endorsed]: Filed Dec. 12, 1928.

[Title of Court and Cause—No. 2889.]

ORDER ALLOWING APPEAL.

Now, on this 12th day of December, 1928, the same being one of the regular juridical days of the 1928 Term of the above court, held at Fairbanks, Alaska, this cause came on to be heard upon petition of the above-named plaintiffs for an appeal to

the United States Circuit Court of Appeals for the Ninth Circuit from the judgment of this Court made and entered in this action on the 10th day of October, 1928, and the Court being fully advised in the premises,—

IT IS ORDERED that the said plaintiff's appeal to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, be, and the same is hereby allowed, upon the execution by the appellants of a good and sufficient bond to be approved by this Court, in the sum of \$500.00 said bond to be conditioned as a cost bond on appeal.

Done in open court this 12th day of December, A. D. 1928.

CECIL H. CLEGG,
District Judge.

Due service of order allowing appeal and receipt of copy of above acknowledged this 12th day of December, A. D. 1928.

LOUIS K. PRATT,
Attorney for Defendant.

Entered in Court Journal No. 17, page 357. [65]

[Endorsed]: Filed Dec. 12, 1928.

[Title of Court and Cause—No. 2889.]

NOTICE OF APPEAL.

To H. W. Reeth, the Above-named Defendant, and
to Louis K. Pratt, Esq., His Attorney.

You and each of you will please take notice that

the above-named plaintiffs, John W. Felder, Maurice A. Gale, George Schmidt and Robert Gierke, copartners doing business as Felder, Gale and Company, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, from that certain judgment made and entered in the above-entitled action in the District Court for the Territory of Alaska, Fourth Judicial Division, on the Tenth day of October, A. D. 1928, in favor of the above-named defendant and against the said plaintiffs, in which said judgment the said defendant was awarded the sum of \$3,789.79 and the costs of the said action; plaintiffs also appeal from the order of said District Court overruling the plaintiff's motion for a new trial of said cause, made on October 6, 1928.

Said appeal is taken on questions of both law and fact.

ALBRECHT and TAYLOR,

Attorneys for Plaintiffs.

P. O. Address: Fairbanks, Alaska.

Received copy of above notice of appeal this 12th day of December, 1928.

LOUIS K. PRATT,

Attorney for Defendant. [66]

[Endorsed]: Filed Dec. 13, 1928.

[Title of Court and Cause—No. 2889.]

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That we, John W. Felder, Maurice A. Gale, George Schmidt and Robert Gierke, copartners, doing business as Felder, Gale and Company, principals and National Surety Company, a corporation, as surety, are held and firmly bound unto H. W. Reeth, the above-named defendant, in the sum of five hundred dollars (\$500.00) lawful money of the United States, for the payment of which sum, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 12th day of December, A. D. 1928.

The condition of the above obligation is such, that whereas the above-named plaintiffs have taken an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from that certain judgment rendered in the above-entitled action in the District Court for the Territory of Alaska, Fourth Division, on the 10th day of October, 1928.

NOW, THEREFORE, if the above-named plaintiffs, appellants, shall prosecute the said appeal to effect, and answer all costs if they fail to make good

their plea, then this obligation shall be void, otherwise to remain in full force and effect.

FELDER, GALE and COMPANY,
[Seal] By CHAS. E. TAYLOR,
One of Their Attorneys,
Principals.
NATIONAL SURETY COMPANY.
By GEO. W. ALBRECHT,
Its Attorney-in-fact,
Surety.

The above bond approved this 12th day of December, 1928.

CECIL H. CLEGG,
District Judge. [67]

[Endorsed]: Filed Dec. 13, 1928.

[Title of Court and Cause—No. 2889.]

CITATION ON APPEAL.

The President of the United States of America, to the Above-named H. W. Reeth, Appellee, and to Louis K. Pratt, Esq., His Attorney,
GREETING:

You are hereby cited to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the city of San Francisco, State of California, within thirty (30) days from the date of this citation, pursuant to an order allowing an appeal, made and entered in the above-entitled cause, in which John W. Felder, Maurice A.

Gale, George Schmidt and Robert Gierke, copartners, doing business as Felder, Gale and Company are plaintiffs and appellants and H. W. Reeth is defendant and appellee, to show cause, if any there be, why the judgment made and entered in said action on the tenth day of October, 1928, as mentioned in said order allowing appeal, should not be set aside and reversed, and why speedy justice should not be done to said appellants above named in that behalf.

WITNESS the Honorable WILLIAM H. TAFT, Chief Justice of the Supreme Court of the United States of America, on this 12th day of December, A. D. one thousand nine hundred and twenty-eight and of our Independence one hundred fifty-three.

Attest my hand and the seal of the above-named District Court at Fairbanks, Alaska, on this the twelfth day of December, A. D. one thousand nine hundred twenty-eight.

CECIL H. CLEGG,
District Judge.

Due service of the foregoing citation admitted this 13th day of December, 1928.

LOUIS K. PRATT,
Attorney for Appellee. [68]

[Endorsed]: Filed Dec. 12, 1928.

[Title of Court and Cause—No. 2889.]

STIPULATION RE PRINTING OF RECORD.

It is hereby stipulated by and between the above

parties plaintiff and defendant, through their respective attorneys, that in printing the papers and records to be used on the hearing on appeal in the above-entitled cause, for the consideration of the United States Circuit Court of Appeals for the Ninth Circuit, the title of the court and cause in full on all papers shall be omitted, except on the first page of said record, and that there shall be inserted in place of said title in all papers used as a part of said record the words, "Title of Court and Cause"; also that all indorsements on all papers used as a part of said record shall be omitted, except the Clerk's filing marks and the admission of service.

Dated at Fairbanks, Alaska, this 12 day of December, 1928.

ALBRECHT and TAYLOR,
Attorneys for Plaintiffs.
LOUIS K. PRATT,
Attorney for Defendant. [69]

[Endorsed]: Filed Dec. 14, 1928.

[Title of Court and Cause—No. 2889.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To Robert W. Taylor, Clerk of the Above-entitled Court:

You will please prepare transcript of the record in the above-entitled cause, to be filed in the office of the Clerk of the United States Circuit Court

of Appeals for the Ninth Circuit, at San Francisco, California, upon appeal heretofore perfected to said court, and will include in said transcript the following documents, papers and records, to wit:

1. Complaint.
2. Answer and counterclaim.
3. Demurrer to answer and counterclaim.
4. Order sustaining demurrer.
5. Second amended answer and counterclaim.
6. Plaintiff's motion to strike second amended answer and counterclaim.
7. Order denying motion.
8. Plaintiff's demurrer to second amended answer and counterclaim.
9. Order overruling demurrer.
10. Reply of plaintiff.
11. ~~Stipulation to take depositions of witnesses.~~
C. E. T.
12. Trial by Court at Bethel—Proceedings. ~~Evi-~~
~~dence of witnesses.~~
13. ~~Deposition of Witness John Froskland.~~ C. E. T.
14. ~~Deposition of Witness Tony Sumi;~~ C. E. T.
15. ~~Deposition of witness Robert Egsak;~~ C. E. T.
16. Stipulation as to trial of case at Bethel.
17. Findings of fact and conclusions of law.
18. Plaintiff's objections to findings of fact and conclusions of law. [70]
19. Plaintiff's proposed amendments to findings of fact and conclusions of law.
20. Plaintiff's motion for new trial.
21. Order denying motion for new trial.
22. Judgment.

23. Order extending time for filing bill of exceptions.
24. Bill of exceptions and assignment of errors.
25. Petition for appeal.
26. Order allowing appeal.
27. Notice of appeal.
28. Bond on appeal.
29. Citation.
30. Stipulation relative to printing of record.
31. Praeceptum for transcript of record.
32. Designation of place of hearing appeal.
33. Order extending time within which to file and docket cause on appeal.
34. ~~Designation of place of hearing appeal.~~ Omit
—same as No. 32 above.

This transcript to be prepared as required by law and the rules of this court and of the United States Court of Appeals for the Ninth Circuit, and to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, on or before the fifteenth day of February, A. D. 1929, pursuant to the order of this Court.

ALBRECHT and TAYLOR,
Attorneys for Plaintiffs-Appellants.

Due service of the foregoing praecipe for transcript of record and receipt of a copy thereof duly admitted this 14th day of December, A. D. 1928.

LOUIS K. PRATT,
Attorney for Defendant-Appellee. [71]

[Endorsed]: Filed Dec. 14, 1928.

[Title of Court and Cause—No. 2889.]

DESIGNATION OF PLACE FOR HEARING
APPEAL.

To the Honorable CECIL H. CLEGG, Judge of the
Above-entitled Court, and to H. W. Reeth, the
Above-named Defendant, and Louis K. Pratt,
Esq., His Attorney.

Come now the above-named appellants, plain-
tiffs in the above-entitled cause, and pursuant to the
provisions of the Act of Congress, giving the desig-
nation of the place of hearing on appeals to the
appellant, does hereby designate the City and
County of San Francisco, State of California, as
the place for the hearing of the said appeal in the
above-entitled action.

Dated at Fairbanks, Alaska, December 14, 1928.

ALBRECHT and TAYLOR,
Attorneys for Plaintiffs.

Due service of the foregoing is hereby admitted
this 14th day of December, A. D. 1928.

LOUIS K. PRATT,
Attorney for Defendant. [72]

[Endorsed]: Filed Dec. 14, 1928.

[Title of Court and Cause—No. 2889.]

ORDER EXTENDING TIME TO AND INCLUDING FEBRUARY 15, 1929, WITHIN WHICH TO FILE AND DOCKET CAUSE ON APPEAL.

This matter coming on for hearing on the motion of the plaintiffs above named, the appellants, for an order extending the time within which to file and docket the record herein on appeal with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, and it appearing to the satisfaction of the Court that the time allowed by law and the order of this Court allowing said appeal is insufficient for the purpose, and that the plaintiff-appellant desires an extension of time until and including the 15th day of February, A. D. 1929, within which to file and docket said cause as aforesaid, and all and singular the matters being fully understood and considered by this Court,—

IT IS THEREFORE ORDERED that the plaintiffs-appellant be and they are hereby given and granted until and including the fifteenth day of February, A. D. one thousand nine hundred twenty-nine, within which to file and docket the record on appeal with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, State of California.

Done in open court at Fairbanks, Alaska, December 14, A. D. 1928.

CECIL H. CLEGG,

District Judge.

Due service hereof admitted this December 14, 1928.

LOUIS K. PRATT,

Attorney for Appellee.

Entered in Court Journal No. 17, page 361. [73]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO TRANSCRIPT OF RECORD.

United States of America,
Territory of Alaska,
Fourth Division,—ss.

I, Rob't W. Taylor, Clerk of the District Court, Territory of Alaska, Fourth Division, do hereby certify that the foregoing, consisting of 73 pages, constitutes a full, true and correct transcript of the record on appeal in cause No. 2889, entitled John W. Felder, Maurice A. Gale, George Schmidt and Robert Gierke, Copartners Doing Business Under the Firm Name and Style of Felder, Gale and Company, Plaintiffs, vs. H. W. Reeth, Defendant, and was made pursuant to and in accordance with the praecipe of the plaintiff, filed in this action and made a part of this transcript, and by virtue of the said appeal and citation issued in said cause, and is the return thereof in accordance therewith, and I certify that the citation on appeal, order allowing appeal,

stipulation relative to printing of record and order extending time within which to file and docket cause on appeal annexed hereto are the originals thereto.

And I do further certify that the index thereof, consisting of pages number i and ii, is a correct index of said Transcript of Record; also that the cost of preparing said transcript and this certificate, amounting to Thirty-one Dollars and Fifty-five Cents (\$31.55), has been paid to me by counsel for appellant in said action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court this 31st day of January, 1929.

[Seal]

ROBT. W. TAYLOR,

Clerk of the District Court, Territory of Alaska,
Fourth Division. [74]

[Endorsed]: No. 5718. United States Circuit Court of Appeals for the Ninth Circuit. John W. Felder, Maurice A. Gale, George Schmidt and Robert Gierke, Copartners Doing Business as Felder, Gale and Company, Appellants, vs. H. W. Reeth, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Territory of Alaska, Fourth Division.

Filed February 11, 1929.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States
20
Circuit Court of Appeals
For the Ninth Circuit.

JOHN W. FELDER, MAURICE A. GALE,
GEORGE SCHMIDT AND ROBERT
GIERKE, Copartners, Doing Business as
FELDER, GALE AND COMPANY,
Appellants,

vs.

H. W. REETH,
Appellee.

BRIEF FOR APPELLANTS.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE TERRITORY OF ALASKA, FOURTH DIVISION.

GEO. W. ALBRECHT,
CHAS. E. TAYLOR,
Attorneys for Appellants.

FILED
MAY 28 1939

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No. 5718.

United States
Circuit Court of Appeals

For the Ninth Circuit.

JOHN W. FELDER, MAURICE A. GALE,
GEORGE SCHMIDT and ROBERT
GIERKE, Copartners, Doing Business as
FELDER, GALE AND COMPANY,
Appellants,

vs.

H. W. REETH,

Appellee,

BRIEF FOR APPELLANTS.

This is an appeal by the above-named appellants from a judgment rendered in the District Court for the Territory of Alaska, Fourth Judicial Division, on the tenth day of October, 1928, against the said appellants, who were the plaintiffs in the lower court, and in favor of the above-named appellee, H. W. Reeth, who was defendant therein, in an action brought by said appellants to recover the sum of \$5,402.65 alleged by them and admitted by appellee to be due appellants on account of certain checks issued by said appellee and cashed by appel-

lants and for certain goods and merchandise sold and delivered to appellee by appellants, to which account the appellee filed a counterclaim for the sum of ten thousand dollars for certain matters arising out of a tort, and in which counterclaim appellee alleged that he waived the tort and elected to sue in contract.

STATEMENT OF THE CASE.

During the years 1919 and 1920, appellants were carrying on a general mercantile business at Bethel, on the Kuskokwim River in the Fourth Judicial Division of Alaska, the appellee being at such time engaged in mining operations on the Riglugalic River, a tributary of said Kuskokwim River, and about one hundred and fifty miles above Bethel. For the purpose of carrying on such mining operations, the appellee bought supplies and provisions from appellants, which were charged to his account at appellants store at Bethel. Appellee also from time to time paid off his employees with checks drawn on the Scandinavian Bank at Seattle, Washington, which checks, the appellants cashed at their store aforesaid, and thereafter forwarded such checks to Seattle for payment. These checks were returned by the Seattle bank to appellants, unpaid and marked "NO FUNDS."

The amount of goods and merchandise sold and checks cashed by appellants as aforesaid, aggregated the sum of \$5,402.65, the particulars whereof are set out in the twenty-nine causes of action contained in the complaint in the lower court. Appellee

ceased his mining operations about the month of June, 1920.

During the year 1920, appellee caused to be shipped from San Francisco, Cal., certain hydraulic pipe and equipment, which was transported up the Kuskokwim and Riglugalic Rivers to a point about forty miles below the mining ground of appellee, and there unloaded and piled on the bank of the river, where it remained until the fall of the year 1921, apparently abandoned by appellee who was not then engaged in mining.

In the month of August, 1921, appellants were informed that the said pipe and equipment belonging to appellee was in danger of falling into the river by reason of the river having washed against and undermined the river bank at that place, and that some of such pipe was overhanging said bank and that unless prompt action was taken to prevent it, the same would fall into the river, and that no person was in the vicinity or looking after the said property.

That appellants, having in mind their account with appellee, thereupon sent up some men and removed the said pipe and equipment from said river bank to Bethel, Alaska, and notified appellee of what they had done, but heard nothing from appellee.

Appellants kept said pipe and equipment for two years and then sold the same for the sum of \$550.00, which amount they credited upon the amount then due and owing from appellee.

That in October, 1923, appellants brought this suit in the lower court to recover the amount due them from appellee as shown by the twenty nine causes of action in the complaint. Appellee answered the said complaint, admitting all of the said causes of action, and set up a counterclaim alleging a tort by the appellants in taking and removing the said pipe and equipment without his consent and selling and disposing of the same. In his answer and counterclaim, appellee alleged that he waived the tort and elected to sue in contract for the value of the said property, which he then and there alleged to be the sum of three thousand dollars, being invoice price \$1,955.00, plus cost of transportation \$1,045.00. (See p. 48, Tr.)

A demurrer was interposed to this answer and counterclaim, which was by the lower court sustained, and an amended answer and counterclaim filed, which was upon motion, stricken from the files.

Appellee thereupon filed his second amended answer and counterclaim, admitting all of the allegations of the plaintiff's complaint, and setting up a counterclaim, alleging a tort by the appellants in removing and disposing of the said property without his consent, and alleging that he waived the tort and elected to sue in contract, and claimed the value of said property TO HIM to be ten thousand dollars.

Appellants demurred to this second amended answer and counterclaim, for the reason that the same sounded in tort and was not the proper subject of

a counterclaim under the laws of Alaska (see p. 64, Tr.), which said demurrer was by the Court overruled, whereupon appellants replied denying the allegations of the affirmative matter and counterclaim in said second amended answer and counterclaim.

The usual place of holding court within the Fourth Judicial Division of Alaska, is at Fairbanks, Alaska, about six hundred miles from Bethel, and owing to the great distance between the two places and the great inconvenience and expense that would necessarily be entailed in bringing witnesses from Bethel to Fairbanks to try the case, and the Judge being about to go to Bethel to hold a term of court there, it was stipulated between counsel for the respective parties, that the Judge should try the case at Bethel, but that neither side should be represented at the trial by counsel, and that they should argue the law of the case to the Court upon his return to Fairbanks. That under this stipulation, the case was tried at Bethel by the Judge, without a jury, and upon his return to Fairbanks, the matter was argued at length by counsel for both sides.

That after such argument, the Court made and filed his findings of fact and conclusions of law, in which he found as matters of fact:

1. That the defendant (appellee herein), became indebted to the plaintiffs (these appellants) upon the causes of action set forth in their complaint with accrued interest, in the sum of \$8,690.21. (See p. 76, Tr.)

2. That the said defendant was the owner of certain hydraulic pipe and machinery (enumerating it), and that these appellants caused the same to be removed from the Riglugaric River to Bethel, Alaska, without the consent of appellee. That the action of the plaintiffs in taking the said machinery and disposing of it was without the knowledge or consent of the defendant, WAS UNLAWFUL, UNJUSTIFIABLE and OPPRESSIVE and resulted in compelling the defendant to abandon his mining enterprise at Golden Gate Falls. That under the circumstances and conditions as they existed at that time and place and by reason of the fact that there was no market value for said machinery at that time and place, and by reason of the use that the defendant could have put it to, the said machinery was worth TO HIM the sum of \$8,000.00 and he is entitled to counterclaim that amount with interest at 8% per annum from Sept. 1, 1921, aggregating \$12,480.00 as against the debt owing by him to the plaintiffs. And as conclusions of law the Court found that the said H. W. Reeth is entitled to recover from the plaintiffs (these appellants), the sum of \$3,789.79 and the costs and disbursements of the action. To all of the matters of fact found by the Court in paragraph two of said findings and to the conclusions of law therein expressed, these appellants filed their objections and exceptions, which were by said Court overruled and exception allowed. (See p. 79, Tr.)

That plaintiffs also filed and presented to said Court their proposed findings of fact and conclu-

sions of law, wherein they requested the said Court to find that the defendants' alleged counterclaim is not one arising out of the contract set forth in plaintiff's complaint as the foundation of plaintiff's claim, nor is it one arising on contract, but is purely a right of action in tort, and is not allowable as a counterclaim under section 896 of the Compiled Laws of Alaska, or of any other law, and that the plaintiffs were entitled to judgment in the sum of \$8,190.21 against the said H. W. Reeth; which said proposed findings and conclusions the court denied, to which decision the plaintiffs excepted and exception was allowed. (See p. 81, Tr.)

That thereafter, the plaintiffs filed their motion for a new trial of said action, alleging as reasons therefor, errors in law by admitting any evidence whatever to support the defendant's alleged counterclaim; insufficiency of the evidence to justify the judgment; error in law in pronouncing any judgment in favor of the defendant; which said motion for a new trial was overruled by the Court. (See p. 86, Tr.)

That thereafter the Court rendered its judgment in said action in favor of the said H. W. Reeth and against these appellants for the sum of \$3,789.79 and the costs and disbursements of the said action, amounting to the sum of \$30.95 (see p. 87, Tr.) from which said findings of fact and conclusions of law, order denying plaintiff's proposed findings of fact and conclusions of law, order denying motion for new trial and from said judgment, this appeal is taken. (See pp. 96 to 99, Tr.)

ASSIGNMENT OF ERRORS. (See p. 90, Tr.)

1. The Court erred in denying the plaintiff's motion to strike from the files the defendant's second amended answer and counterclaim, or in the alternative that the defendant be required to separate and plead the defenses therein contained, in the manner required by law, for the reason that the said second amended answer and counterclaim contains several defenses which are not properly stated.

2. The Court erred in overruling the plaintiff's demurrer to defendant's second amended answer and counterclaim for the following reasons:

- (a) That this Court has no jurisdiction of the subject matter set up in said answer and counterclaim; it not being a proper subject of counterclaim under the laws of Alaska.
- (b) That said second amended answer and counterclaim does not state facts sufficient to constitute a defense to the plaintiff's complaint.

3. The Court erred in overruling paragraph 2 of plaintiff's objections to defendant's proposed findings of fact and conclusions of law, wherein they objected to the whole of paragraph 2 of said proposed findings of fact because the said paragraph 2 of said proposed findings of fact is intended to support the defendant's alleged counterclaim, which did not arise out of the contract or transaction set forth in plaintiff's complaint; nor is it one arising on contract, but is purely a right of action in tort, and not allowable as a counterclaim under the laws of Alaska.

4. The Court erred in finding as a fact the following statement contained in paragraph 2 of the findings of fact and conclusions of law filed herein, commencing at paragraph 2 thereof, as follows:

“That prior to August, 1921, the defendant became the owner by location and purchase of contiguous placer mining claims of an area of about 1200 acres located at Golden Gate Falls, on the Riglugalic River, a tributary of the Kuskokwim River in the said Division and Territory, and up to that time had prepared the same for hydraulic mining by the construction of cabins, machine shops and other buildings, digging ditches, placing a dam across said river and clearing the ground of brush and was ready to commence open cut hydraulic mining thereon.”

for the reason that the same is irrelevant and immaterial, and is inserted as a foundation for damages in tort, which tort the said defendant has expressly waived in his answer aforesaid.

5. The Court erred in finding as a fact the following statement contained in said paragraph 2 of the findings of fact aforesaid, commencing at the middle of line 18 thereof on page 3, and including the words “and in charge of a native Indian,” for the reason that such finding is not supported by any evidence whatever, and is inserted as a further foundation for damages in tort.

6. The Court erred in finding as a fact that portion of section 2 of such findings, commencing on line 19 at page 3 thereof with the words

“That in August, 1921, the plaintiffs employed one Tony Sumi to proceed with a power boat from Bethel to the said Supply Camp on the Riglugalic River and load the said machinery thereon and return it to Bethel, which the said Tony Sumi did, and delivered the same to these plaintiffs who afterwards sold the same and kept the proceeds. That the action of the plaintiffs in taking the said machinery and disposing of it was without the knowledge or consent of the defendant, was unlawful, unjustifiable and oppressive and resulted in compelling the defendant to abandon his mining enterprise at Golden Gate Falls.”

for the reason that such allegation is inserted as a further foundation for damages in tort, and that such tort is not a proper counterclaim to the plaintiff's complaint.

7. That the Court erred in refusing to find as a fact the plaintiff's proposed finding of fact No. 6 as set out in said proposed findings, as follows:

“6. That the plaintiffs, in the fall of 1921, for the purpose of saving the same from being lost through falling into the Riglugalic River, took possession of a quantity of hydraulic pipe and other mining equipment, the property of the defendant, and held the same for about two years and then disposed of all of the property for the sum of five hundred and fifty dollars (\$550.00), which amount the plaintiff's credited in account to the defendant.”

for the reason that such allegation is a material fact and is supported by the evidence.

8. The Court erred in finding as a fact that certain allegation contained in paragraph 2 of the said findings of fact, commencing on line 29 of page 3 thereof, and continuing as follows:

“That under the circumstances and conditions as they existed at that time and that by reason of the fact that there was no market value for the said machinery at that time and place, and by reason of the use that the defendant could have put it to, the said machinery was worth to him the sum of \$8,000.00.”

for the reason that the said finding is inserted as a further basis and foundation for damages in tort, and that such tort is not a proper counterclaim to plaintiff's complaint.

9. The Court erred in finding as a fact that certain allegation commencing on line 34 of page 3 of said findings of fact and conclusions of law aforesaid, and continuing as follows:

“and he is entitled to counterclaim that amount with interest thereon at 8% per annum from September 1, 1921, as against the debt owing by him to plaintiffs.”

for the reason that such damages sound in tort and are not a proper counterclaim to plaintiff's complaint, and that such allegation is a conclusion of law.

10. That the Court erred in concluding as a matter of law that the defendant H. W. Reeth is en-

titled to recover of and from the plaintiffs the sum of \$3,789.79 and the costs and disbursements of the action, for the reason that such conclusion is not warranted or sustained by the facts of the case, and that such amount is not a proper counterclaim against plaintiff's complaint, nor did it arise out of the same transaction sued upon by plaintiffs.

11. The Court erred in overruling the plaintiff's objections to said conclusions of law as set forth in paragraph 3 of "plaintiff's objections to defendant's proposed findings of fact and conclusions of law," and which proposed findings and conclusions were thereafter adopted by the Court as the findings of this case.

12. The Court erred in refusing to allow and adopt paragraph 1 of plaintiff's proposed conclusions of law, as follows:

"That the defendant's alleged counterclaim is not one arising out of contract or transactions set forth in the complaint as the foundation of the plaintiff's claim; nor is it one arising on contract, but is purely a right of action in tort and is not allowable as a counterclaim under Sec. 896 of the Compiled Laws of Alaska, or any other law."

for the reason that such proposed conclusion is the proper law governing this action.

13. The Court erred in refusing to allow and adopt paragraph 2 of the plaintiff's proposed conclusions of law, as follows:

“That taking into consideration the plaintiff’s 28 causes of action, and the credit set forth in plaintiff’s reply, together with interest thereon, there is now due and owing from the defendant to plaintiffs the sum of eight thousand one hundred and ninety dollars and twenty-one cents (\$8,190.21) and that the plaintiffs are entitled to a judgment against the defendant for said sum and for their costs and disbursements of this action.”

for the reason that such conclusion of law is fully borne out by the pleadings, the evidence and is the proper law governing the case.

14. The Court erred in giving and entering judgment against the plaintiffs in this action, for the reason that the facts alleged in plaintiff’s complaint are admitted by the defendant; that the counterclaim set out in defendant’s second amended answer and counterclaim did not grow or arise out of the same transaction, but is for damages in tort, and is not a proper subject of counterclaim under the laws of Alaska.

15. The Court erred in overruling plaintiff’s motion for a new trial for the reason that the pleadings in said action and the evidence adduced thereon and admitted by the Court to sustain the counterclaim of the defendant was not sufficient to justify a judgment in favor of the defendant, and that such judgment was erroneous in law as well as in fact. (See pp. 90, to 96, Tr).

POINTS.

1. Under the laws of Alaska an independent, disconnected, separate tort, not forming a part of the transaction sued upon as the basis of plaintiff's cause of action, or connected with the subject of the action, cannot be made the basis of a counterclaim.

2. That the cause of action submitted by the defendant as a counterclaim in this action, did not arise out of the contract or transaction set forth in plaintiff's complaint as the foundation of plaintiff's claim; nor did it arise out of any contract whatsoever, but is founded purely in tort, and is therefore not a proper subject of counterclaim under the laws of Alaska.

3. Supposing, but not conceding, that one could, by electing to waive a tort and rely upon an implied contract, so as to bring his case within the provisions of the statute of Alaska relating to counterclaims, the mere allegation of a waiver of tort by the pleader is not alone sufficient for that purpose. He must abandon the idea of an action in tort and frame his pleadings under the rule of actions *ex contractu*.

4. Defendants alleged counterclaim is framed as an action in tort; notwithstanding his alleged waiver, he lays the foundation for damages in tort, from start to finish. His work for two years previous to the alleged tort; his forced abandonment of his mining venture; his allegation that plaintiff's

acts were wrongfully and unlawfully done and that the value of the property taken was of the REASONABLE VALUE TO HIM of ten thousand dollars. The pleading is so drawn as to veritably shriek in tort.

5. The mere allegation by the pleader that he waives the tort and elects to rely upon an implied contract has the effect only of an election of remedies, and if his pleading is drawn so as to otherwise sound in tort, it is bad upon demurrer.

6. If the counterclaim of the defendant could in any way be considered as arising out of contract, either express or implied, the measure of his recovery under the rule of contract, should be either for money had and received for his benefit, that being the amount that the plaintiff benefited by the transaction, or, at most, the cost of replacement of the property. Any greater measure of value or damages would sound in tort, and the tort is not a proper subject of counterclaim in an action on contract under the law of Alaska.

7. Where in an action on contract, defendants attempts to set up conversion and sale of goods, and, waiving the tort, elects to rely upon implied assumpsit for the value of the goods, the measure of recovery awarded to the defendant was the value of the goods TO HIM, without any reference to the cost of reproduction or replacement of the goods, or the market value thereof, the award to the defendant sounds in tort and not in contract.

8. In conversion and sale of goods, where the tort is alleged to be waived and pleader relies on

implied contract for the value of the goods, a finding of fact by the Court "that the acts of the plaintiff in taking the goods were unlawful, unjustifiable and oppressive and resulted in compelling the defendant to abandon his mining enterprise," sounds in tort, and conclusively shows that the Court viewed and considered the action as in tort and not in contract, and that the tort formed the basis and measure of compensation awarded to the defendant.

9. Where defendant, in an action on contract sets up as a counterclaim, a conversion and sale of goods by the plaintiff, and alleges that he waives the tort and elects to rely upon the implied contract to pay the value of the goods, and that the goods are of **A REASONABLE VALUE TO HIM** of ten thousand dollars, the allegation as to the value of the goods sounds in tort and not in contract and the demurrer of the plaintiff to said counterclaim should have been sustained.

10. Unliquidated damages arising out of tort cannot be pleaded as a counterclaim in an action brought on contract, even where the tort is waived and an action in *assumpsit* relied upon.

11. The pleadings of the defendant, the rulings of the Court in overruling plaintiff's demurrer thereto, the findings of fact and conclusions of law adopted by the Court and the judgment rendered, all show conclusively that the defendants' case was tried and considered upon the rules and principles governing actions in tort and not upon the rules and principles governing actions in contract, and as so considered, the defendant's case was not a

proper subject of counterclaim under the laws of Alaska.

ARGUMENT.

FIRST ASSIGNMENT OF ERROR.

The Court erred in refusing to strike the defendant's second amended answer and counterclaim, for the reason that the same contains several defenses which are not properly stated, or in the alternative that the defendant be required to state them separately.

A mere perusal of the pleading will disclose the objections to it but inasmuch as only one of the defenses therein stated was considered by the Court in its findings of fact and judgment, this assignment of error is not now seriously urged.

SECOND ASSIGNMENT OF ERROR.

The Court erred in overruling plaintiff's demurrer to defendant's second amended answer and counterclaim, for the reasons,

- (a) That the Court has no jurisdiction of the subject matter set up in said pleading because it is not a proper subject of counterclaim under the laws of Alaska.
- (b) That the said answer and counterclaim does not state facts sufficient to constitute a defense to plaintiff's complaint.

The subject of counterclaim in Alaska is governed by the provisions of Secs. 895 and 896 of the Compiled Laws of Alaska and are as follows:

Sec. 895.—The answer of the defendants shall contain, First. A general or specific denial of each material allegation of the complaint, controverted by the defendant, or of any knowledge or information thereof, sufficient to form a belief. Second. A statement of any new matter constituting a defense or counterclaim in ordinary and concise language, without repetition.

Sec. 896. The counterclaim mentioned in the last preceding section must be one existing in favor of the defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of the following causes of action: First. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim. Second. In an action arising on contract, or any other cause of action arising also on contract, and existing at the commencement of the action. The defendant may set forth by answer as many defenses and counterclaims as he may have. They shall each be separately stated, and refer to the causes of action which they are intended to answer in such manner that they may be intelligibly distinguished.

Sections 895 and 896 of the Compiled Laws of Alaska were originally taken and adopted from the statutes of Oregon, and are identical with Sec. 73 of Lord's Oregon Laws, and the construction of such statute by the Oregon Supreme Court, at the time of such adoption, if such can be found should be controlling in Alaska.

It must be at once conceded that the counterclaim set up by the defendant in this action is not one arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim; therefore it cannot be considered under the first subdivision of the foregoing statute.

And that to bring it under the second subdivision of Section 896, the counterclaim must arise out of CONTRACT.

Defendant has attempted to bring his second amended counterclaim within the provisions of the second subdivision of the foregoing section 896, by an express allegation "that he waives the tort and elects to rely upon an implied contract upon the part of the plaintiffs, created by law to pay him the sum of ten thousand dollars for said machinery and equipment, the the same being the *reasonable value thereof*;" although in his original answer and counterclaim he alleged that the invoice price of the property to be \$1,955.00 and freight charges \$1,045.00; alleging a total value of the property to be \$3,000.00.

While we fully recognize the rule of law that will entitle one in a proper case, to waive a tort and sue upon an implied contract, yet we do not concede any rule which will permit one to allege that he waives the tort and elects to sue in contract, and then set up as a counterclaim a cause of action arising in tort, sounding in tort and not arising out of the same transaction set forth in plaintiff's complaint as the foundation of the plaintiff's claim, but seeks to recover damages as in a tort action.

In 1897, the Supreme Court of Oregon, in the case of Ziegler vs. McClellan, 16 Pac. 179, decided that a tort cannot be pleaded as a counterclaim in an action on contract, unless it constitutes a breach of the contract. And again in 1889, in the case of Lowenburg et al. vs. Rosenthal et al., 22 Pac. 601, the same Court, speaking through Chief Justice Thayer, says:

“I am unable to understand how a counterclaim can arise out of a transaction which constitutes the foundation of a claim for damages for a trespass, under the section of the Code above referred to. It certainly is not provided for in the Second sub-division of said section, as that applies wholly to contracts.

and the doctrine thus announced is still in full force in Oregon.

Miser vs. O'shea, 37 Or. 231, 62 Pac. 491;
Title G. & Abst. Co. vs. Nashburg, 58 Or. 190,
113 Pac. 2;

Casner vs. Hoskins, 64 Or. 254, 128 Pac. 841;
Chamberlain vs. Townsend, 72 Or. 207, 142
Pac. 782;

McGarger vs. Wiley (Or.), 229 Pac. 665;
Town of Eagle Point vs. Hanscom (Or.),
252 Pac. 399;

Krausse vs. Greenfield (Or.), 123 Pac. 393,
see point 6;

and should be controlling in Alaska. The courts of Alaska have not heretofore been called upon to adjudicate this question.

So that in order to bring the defendants attempted counterclaim within the second subdivision of the Alaska statute, we must look for some form of contract between the parties, either express or implied.

Of course, we recognize and concede the rule to be in some jurisdictions, that if any party may sue either in tort or *assumpsit*, and he elects to waive the tort and rely on *assumpsit*, such a cause of action may be used as a counterclaim, upon the theory of implied contract, but in view of the language of the Oregon court we cannot concede it to be the law of Alaska. The question of the waiver of tort to bring the case within the counterclaim statute is an open question so far as Alaska is concerned. We are therefore confronted by two questions; First, what is the nature of the contract thus implied by the waiver of the tort in this jurisdiction? Second. Has the defendant, by his pleading, brought himself within the rule so as to sustain his cause of action as a counterclaim under the Alaska law? As to the first question, the rulings of the Courts are many and varied. Many courts hold that waiver of tort and suit in *assumpsit* will not be allowed unless the property taken has been converted into cash or its equivalent, and that the action must be for money had and received, upon the theory that the owner waives the wrongful taking, adopts the wrongdoer as his agent and ratifies the sale as made for his use and benefit.

Other courts have extended the doctrine so as to include cases where no sale was made, but the prop-

erty converted to the use of the wrongdoer, and have permitted the owner to waive the tort and sue in *assumpsit* for the value of the property upon the theory of an implied sale to the wrongdoer.

If there is an express contract, and the same act or transaction constitutes both a tort and a breach of contract, the injured party may waive the tort and sue on the contract.

1 Corpus Juris, pages 1030 to 1034 and notes.
Cooley on Torts, Secs. 109-111.

Addison on Torts, Wood's Ed., Sec. 52.

In 2 R. C. L., at page 755, the rule is thus stated:

“The most frequent application of the doctrine of waiving the tort and suing in *assumpsit* is to be found where the cause of action is based on the conversion of personal property. In such case the rule is that where the tortfeasor has derived a benefit from the conversion, the owner may waive the tort and proceed against the wrongdoer in an action of *assumpsit* for the full value of the property converted.”

and cites numerous cases under note 12 to support the statement.

We at once concede the rule as stated, except as to the measure of recovery; after an examination of the cases cited we are unable to agree that they sustain such a broad statement, but rather inclining to the classes heretofore announced, according to the nature of the particular case.

We urge, however, that the measure of recovery should be according to the benefits of the transaction received by the wrongdoer.

Addison on Torts Wood's Ed., Sec. 52.

Cooley on Torts, 107-111.

Downs vs. Finnegan (Minn.), 59 N. W. 981.

Challis vs. Wylie (Kan.), 11 Pac. 438.

Fanson vs. Lindley, 20 Kan. 235.

Farmers & M. Bank vs. Huckaby (Okl.), 215 Pac. 429.

2 R. C. L., page 761, Sec. 20.

This rule is stated by Mr. Addison in his treatise on the law of torts, as follows:

“If a man has taken possession of property and sold or disposed of it without lawful authority, the owner may either disaffirm his act and treat him as a wrongdoer, and sue him for a trespass or conversion of the property, or he may affirm his acts and treat him as his agent, and claim the benefit of the transaction; and if he once has affirmed his acts and treated him as an agent, he cannot afterward treat him as a wrongdoer, nor can he affirm his acts in part and avoid them as to the rest.”

Addison on Torts, Wood's Ed., Sec. 52.

To the same effect is Cooley on Torts, 107-111.

In Downs vs. Finnegan, reported in 59 N. W. 981, the Supreme Court of Minnesota, in 1894, says:

“There seems to be no difference of opinion upon the proposition that a mere naked tres-

pass, although creating a liability for damages, cannot be the basis of implied *assumpsit*; ITS BASIS IS THE BENEFIT WHICH THE WRONGDOER HAS RECEIVED.

And in *Fanson vs. Linsley* 20 Kan. 235, the Supreme Court of Kansas said:

“Whenever one person commits a wrong or tort against the estate of another, with the intention of benefiting his own estate, the law will, at the election of the party injured, imply or presume a contract on the part of the wrongdoer to pay to the party injured the full value of all benefits resulting to the wrongdoer.”

and this language was reiterated by the same Court in the cases of

Challis vs. Wylie (Kan.), 11 Pac. 438;
Atchison T. & S. F. R. Co. vs. Phelps (Kan.),
 46 Pac. 183;

and adopted by the Supreme Court of Oklahoma in 1923, in the case of

Farmers & Mer. Nat. Bk. of Hobart vs. Huckaby, 215 Pac. 429.

It would seem that up to the time of the adoption of the statutes of Oregon by Alaska (1884), the Supreme Court of Oregon had not expressed itself upon this question, nor has the Alaska court heretofore had an occasion to consider it.

We earnestly contend that in case of a waiver of tort and election to sue in *assumpsit*, the amount of recovery should be measured by the benefits re-

ceived by the tort-feasor; if the owner of the property is not satisfied with that, he is not compelled to waive the tort, but can sue in tort and demand the full measure of damages which an action in tort might entitle him to.

If, as in the instant case, the defendant alleges a sale of his property by the plaintiff, and he waives the tort and relies upon the implied *assumpsit*, his recovery should be the amount received by the plaintiff and the action for money had and received for his benefit. And this, he has already received.

La Grande Nat. Bank vs. Oliver (Or.), 165
Pac. 682.

Southern Ry. Co. vs. Born Steel Range Co.
(Ga.), 50 S. E. 488.

As to the second question.

Defendant, in his second amended answer and counterclaim alleges: That he was the owner of certain personal property (describing it), which was *reasonably worth* and of the value TO HIM of \$10,000.00. (See par. 2.)

That the plaintiff wrongfully and unlawfully took possession of said property and converted the same to their own use, and sold part, if not all of it. (See Par. 3.)

That he elects to waive the tort and rely upon the implied contract created by law, to pay him the sum of ten thousand dollars, the same being the REASONABLE VALUE of said property. (See par. 4.)

“Where one waives a tort and sues in contract, he makes a binding election of remedies

which cannot be reconsidered * * * * and he cannot thereafter treat the action as if it were a tort action. He may pursue either remedy, but not both.”

1 C. J., page 1039, Sec. 169, notes 41-43.

2 R. C. L., page 754, note 2.

Jones vs. Winsor, 118 N. W. 716.

Fowler vs. Bowery, Savings Bank, 4 L. R. A. 145.

And in such a case the action is governed by the rules and principles applicable to actions *ex contractu*, as regards the venue of the action, the statute of limitations, * * * * the form of judgment and the MEASURE OF DAMAGES.

1 C. J., 1040, Sec. 169, notes 52 to 57.

Lubert vs. Chauviteau, 3 Cal. 458.

Union Pac. R. Co. vs. Shook (Kan.), 44 Pac. 685.

Penn. R. R. Co. vs. Smith (Va.), 56 S. E. 567.

Hutchinson vs. Phillips (Ark.), 11 Ark. 270.

So having elected to waive the tort and sue in *assumpsit*, the defendant should frame his pleadings on the theory of *assumpsit*, and on that theory alone, and if the facts alleged do not show a cause of action in contract, the complaint is bad on demurrer.

Woodruff vs. Zaban (Ga.), 65 S. E. 123.

Braitwaite vs. Akin, 56 N. W. 133.

Miller vs. Hirshberg (Or.), 40 Pac. 506.

“Whether an action is in contract or in tort must be determined by the pleadings and by an examination and construction of the essential allegations of the same, rather than the form adopted by the pleader, and the question must be determined with reference to the pleading as a whole, and not by the particular words and allegations considered apart from the context. THE PRAYER FOR RELIEF and the MEASURE AND AMOUNT OF RECOVERY sought is an important consideration.”

1 C. J., page 1015, Sec. 138, notes 31–36.

Gentry vs. Purcell, 84 Ind. 83.

Donough vs. Dillingham, 43 Hun (N. Y.), 493, 496.

Carter vs. White, 32 Ill. 509.

Holt Ice Co. vs. Jordan (Ind.), 57 N. E. 575.

Ft. Smith & W. R. Co. vs. Ford (Okl.), 126 Pac. 745.

1 C. J., page 1039, Sec. 168, notes 34–5–6.

Smith vs. McCarthy (Kan.), 18 Pac. 204.

Pennoyer vs. People, 105 Ill. 481.

Atchison T. & S. Co. vs. Long (Kan.), 47 Pac. 993.

31 Cyc. 110–111.

Nation vs. Planters Bank (Okl.), 119 Pac. 977.

Johnson vs. Cummings (Colo.), 55 Pac. 269.

Abraham vs. State (Okl.), 244 Pac. 741.

Unliquidated damages arising out of tort cannot be pleaded as a counterclaim in an action brought

on contract, and plaintiffs contend that the measure of damages claimed by the defendant is unliquidated damages, notwithstanding his waiver of tort.

“If the action is such that unliquidated damages are to be assessed at the discretion of the jury, generally set-off cannot as a rule be pleaded”

24 R. C. L., page 810, Sec. 17, note 13.

Lubert vs. Chauviteau, 3 Cal. 458.

Burrage et al., vs. Bonanza Mng. Co. (Or.),
6 Pac. 766.

“It is the well settled general rule that neither at law nor in equity can unliquidated damages be made the subject of a set-off, but only claims whose amount is ascertained or ascertainable by calculation, and which needs no proof except of the liability.”

24 R. C. L., pages 855, 856, Sec. 59, note 4.

Note to Helwig vs. Laschowski, 10 L. R. A.
378.

The Zouave, 29 Fed. 296.

In Southern Ry. Co. vs. Born Steel Range Co.,
supra, the Georgia Supreme Court says:

“The gravamen of the plaintiff’s complaint is that there had been a conversion of the property. * * * It is a well settled rule that a tort may be waived and that the aggrieved party may sue in *assumpsit*, where there has been a sale of the property converted; the action being for money had and received to

the plaintiff's use; but where the property has not been converted into money and a suit is instituted to recover the property or its value, the action is *ex-delicto* and not *ex-contractu*, and the aggrieved party is restricted to this form of action, citing *Cragg vs. Arendale*, 113 Ga. 181, 38 S. E. 399.

To the same effect is *Whilden vs. Merchants and Planters Bank*, 38 Am. Rep. 1.

It has also been said that the right to waive a tort and sue in *assumpsit* will not be indulged where the effect of it would be to give jurisdiction over the subject matter to a Court which otherwise would not possess it, or which would bring a case within the terms of a statute which otherwise would not include it.

2 R. C. L., page 755, Sec. 14, note 11.

1 C. J., page 1033, Sec. 158, note 21.

Ahern vs. Carroll, 30 Mo. 200.

Webb vs. Tweedie, 30 Mo. 488.

Finley vs. Bryson, 84 Mo. 664.

Elliot vs. Jackson, 3 Wis. 649.

Dougherty vs. Chapman, 29 Mo. 233.

Sandeen vs. Kansas C. R. Co., 79 Mo. 278.

Notwithstanding his alleged waiver of tort, the defendant's pleading is not framed otherwise than in tort; he claims as a measure of damages a fictitious value of the property alleged to have been converted; a value TO HIM; not the real value; not the market value; not the amount received for it by plaintiffs, but an arbitrary value to him; in

other words, DAMAGES; and his alleged waiver of tort is meaningless, except as an election which obliges him to rely on the rule governing actions *ex contractu*; but he leaves his pleading sounding in tort and not in contract; and therefore his pleading, sounding in tort, and not framed as an action *ex contractu* is not allowable as a counterclaim under the laws of Alaska. That plaintiffs, having demurred thereto, such demurrer should have been sustained.

Findings of fact based upon allegation or tort and sounding in tort cannot be made the basis of recovery in action *ex contractu*.

ASSIGNMENTS OF ERROR Nos. 3, 4, 5 and 6.

Assignments of error Nos. 3, 4, 5 and 6 go to paragraph two of the defendants' proposed findings of fact and conclusions of law (which said paragraph was adopted by the Court), because the allegations of said paragraph are intended to and do support the defendant's alleged counterclaim, which did not arise out of any contract nor out of the transaction set forth in plaintiff's complaint, but is purely a right of action in tort, and not such a counterclaim as was contemplated under the laws of Alaska. These assignments may be considered together.

The language in said paragraph objected to is as follows:

“That prior to August, 1921, the defendants became the owner by location and purchase of contiguous placer mining claims of an area of about 1200 acres located at Golden Gate Falls

on the Riglugaric River, a tributary of the Kuskokwim River, in the said Division and Territory, and up to that time had prepared the same for hydraulic mining by the construction of cabins, machine shops and other buildings, digging ditches, placing a dam across said river and clearing the ground of brush and was ready to commence open cut hydraulic mining thereon.”

This language was contained in the defendant's second amended answer, and was objected to by plaintiff's motion to strike the same as irrelevant and redundant, but the same was allowed by the Court to stand. We can see no reason for such language in the pleading except as a basis or measure of damages, and must have been included in the Court's findings for the same reason,—the fixing of a measure of damages in tort, a penalty for taking the property, and had no place in an action for the payment of goods, or the replacement thereof; the goods were not taken from said place nor anywhere near it, and what the defendant had done years before had no bearing on the value of mining material which had not yet reached its destination. The goods cost \$3,000.00, including freight charges at the place from where they were taken, according to defendant's original answer, and could have been replaced for the same figure; and the language of the Court in such finding is objected to as laying a foundation for damages in tort and has nothing to do with any contract, implied or otherwise, to pay for anything. The paragraph continues:

“That in 1919, the defendant purchased in San Francisco, California, a hydraulic mining plant consisting of

600 Ft. 12" pipe

200 Ft. 8" pipe

3 10" 90 deg elbows

1 10" to 8" outlet

2 Reflectors

2 20 ft. gravel elevator

6 tops of baskets

400 Ft. 10" pipe

3 8"-90 deg elbows

1 12" to 10" reducer

2 No. 1 Giants

1 Stat. Fairbanks-Morse 3 H. P. Gas engine

5 wheel-barrows

2 bars $\frac{7}{8}$ inch drill steel

and in the summer of 1920 caused the same to be shipped from San Francisco, California, to Bethel, Alaska, and from there it was started to his mining ground at Golden Gate Falls on said Rigugaric River, but owing to high water the boat transporting the same was unable, by reason of the swift current to get farther than a point called ‘supply point,’ on the said river, which is about forty miles down river from said Golden Gate Falls, and at that point the said machinery was taken from the boat and put on the bank and placed in a tent in charge of a native Indian.” (See Assignment No. 5.)

Ordinarily, we would consider this language immaterial and irrelevant; like the first part of said

paragraph two, it was included in defendant's pleading and objected to by plaintiffs, but was allowed to stand if it was considered pertinent, then its object must necessarily be to go to the measure of damages, something to intensify the wrong of plaintiff in taking the same, and therefore sounds in tort and not in contract; there is nothing in said finding as to the cost of the property; nothing as to the invoice price; nothing as to freight charges; nothing as to market price; nothing as to cost of replacement; and what happened in 1920 as to placing the property in charge of a native Indian, if such a thing did happen (although there was nothing whatever about that in the testimony), is entirely immaterial and can have no bearing in fixing the value of property in an action *ex contractu*.

Continuing said paragraph 2—

“That in August, 1921, the plaintiffs employed one Tony Sumi to proceed with a power boat from Bethel to the said ‘Supply Point’ on the Rigugaric River and load the said machinery thereon and return it to Bethel which the said Tony Sumi did and delivered the same to these plaintiffs who afterwards sold the same and kept the proceeds. That the action of the plaintiffs in taking the said machinery and disposing of it was without the knowledge or consent of the defendant, was unlawful, unjustifiable and oppressive and resulted in compelling the defendant to abandon his mining enterprize at Golden Gate Falls.” (See assignment of error No. 6.)

The effect of this language is to accentuate the wrong of the plaintiffs (if wrong there is). This language does not show that any tort was waived; in fact, nowhere in the Court's findings of fact or in the judgment is it shown that any tort was waived. The language shows conclusively that the findings of fact is based upon tort and not upon contract; nowhere in the whole case, except in plaintiff's pleading is it shown that any tort was waived; the findings as well as the judgment shows that the defendant's case has proceeded and has been considered as an action in tort, and as such, is not a proper subject of counterclaim in Alaska.

Again it is submitted that where a tort is waived and an action brought upon an implied contract, the case should be governed by the rules and principles applicable to actions on contract, including the amount and measure of damages.

1 C. J., page 1040, Sec. 169, note 57.

Plaintiffs earnestly contend that no wrong was done by them; it is admitted by the defendant that he owed plaintiffs between five and six thousand dollars; that the account had been outstanding for three years; that the pipe had been lying on that river bank for nearly two years; that it was in danger of being lost to everybody and was removed by plaintiffs to save it; that it had been abandoned by the defendant; that plaintiffs sold it and applied the whole of the proceeds of such sale to the credit of the defendant. And the Court erred in refusing to find as a fact, plaintiff's proposed finding No. 6, which was as follows:

“No. 6. That the plaintiffs in the fall of 1921, for the purpose of saving the same from being lost through falling into the Riglugaric River, took possession of a quantity of hydraulic pipe and other mining equipment, the property of defendant, and held the same for about two years and then disposed of all of said property for the sum of five hundred and fifty dollars, which amount the plaintiffs credited to the account of the defendant.”

In actions of tort, it is said that no defense will avail which goes, not to the gist of the action, but to incidental matters of excuse, benefits and damages.

38 Cyc., 2059, note 59 and cases cited.

This is the general rule in tort actions, and is probably what the Court had in mind when it refused to consider the matters and things set up in plaintiff's reply, and is but another proof that the Court considered and treated the defendant's answer and counterclaim as an action in tort.

ASSIGNMENT OF ERROR No. 8.

The Court erred in finding as a fact, that portion of paragraph two of said findings of fact, commencing on line 29 of page 3 thereof (being a continuation of said paragraph from the last portion objected to), as follows:

“That under the circumstances and conditions as they existed at that time and by reason of the fact that *there was no market value for said machinery at that time and place, and by*

reason of the use that the defendant could have put it to, the said machinery was worth to him the sum of \$8,000.00.

for the reason that the said finding of fact is inserted as a further basis and foundation for damages *in tort* and NOT IN CONTRACT, and is not a proper counterclaim to the plaintiff's complaint under Sec. 896 of the Compiled Laws of Alaska.

“In trover, the measure of damages is the fair, reasonable value of the property converted, which will be presumed to be either what it was worth on the market, irrespective of the price paid for it, or the AMOUNT IT WAS SUBSEQUENTLY SOLD FOR, or what it was actually worth if it had no market value, and where an article has little or no value, and is of special value to the owner, he may recover that.”

38 Cyc., 2092, 2093, notes 56, 57, 58, 59.

“In Contract, damages which are uncertain, contingent or speculative in their nature cannot be made the basis of recovery. This rule is applicable to actions on contract.”

17 C. J., page 753, Sec. 68, notes 46, 47, and many cases cited.

Can there be any doubt as to what was in the Court's mind when he found what amounted to damages in the sum of \$8,000.00 for the defendant, when he used the language “In view of the circumstances and conditions existing at that time, and by reason of the fact that there was no market value

for said machinery at that time or place, and by reason of the use that the defendant could have put it to, the said machinery was worth *to him* the sum of \$8,000.00.

It has been said that the waiving of a tort and suing in contract must ordinarily be beneficial to the defendant, rather than prejudicial to him,

1 C. J., page 1033, Sec. 158, note 20.

Newton Mfg. Co. vs. White, 53 Ga. 395.

Elwell vs. Martin, 32 Vt. 217.

Smith vs. Schulenburg, 34 Wis. 41.

Hinds vs. Tweddie, 7 How. Pr. 278.

In the latter case, the Court says: "it would be difficult to find a case in which the defendant would be prejudiced by a waiver of the tort and resorting to the implied contract."

Yet here we have a case involving property which cost three thousand dollars and in which, if the defendant had not waived the tort, he could not counterclaim, but he alleges that he **WAIVES THE TORT AND ELECTS TO SUE UPON THE IMPLIED CONTRACT TO PAY FOR THE GOODS**, and proceeds to plead in tort; his answer and counterclaim sounds in tort; is alleged in tort; the measure of damages prayed for is in tort. The Court has considered it in tort and has allowed damages in tort, five thousand dollars more than the cost of the property taken, all in the name of an action *ex contractu*. Damages, speculative, contingent and uncertain in their nature; an arbitrary amount of

damage to the defendant. Could anything be more prejudicial to any litigant in the waiver of a tort.

“The rule is well settled that where personal property has been wrongfully taken and converted into money or money’s worth, the owner may waive the tort and sue the wrongdoer in contract for money had and received, upon the theory that he ratifies the sale as made for his benefit, and sues to recover the proceeds as money had and received to his use.”

1 C. J., page 1033, Sec. 159; notes 24, 25, 26 and many cases there cited.

Page on contracts, Sec. 841.

and upon this theory, the defendant, if allowed to counterclaim, should be confined to the amount received by the plaintiffs for the property, which was the sum of \$550.00 and which amount was applied by plaintiffs to the credit of the defendant on the account which he owed them.

“Where goods have been converted and sold, and the owner waives the tort and sues for the money, the measure of damages is the amount of money received, and not the amount of damage done. Waiving the tort waives all right of recovery, beyond the amount received.”

Steam Stone Cutter vs. Sheldons, 15 Fed. 608.

Huginir vs. Cotter (Wis.), 78 N. W. 423, 72

A. S. R. 884.

Fanson vs. Lindsay (Kan.)

Again—in tort actions—

“Ordinarily the measure of damages for the loss or destruction of property is its market value, if it has a market value, and in such a case, no recovery can be had on the basis of its value individually, apart from its market value;
* * * * If the market value would not be a fair compensation to the plaintiff for his loss, he has sometimes been permitted to recover the value to him based on his actual money loss (the price thereof).

8 R. C. L., pages 487, 488.

And “it has been held that where one is permitted to waive a tort and sue on an implied contract, his recovery is limited to the amount of the defendant’s gain or enrichment by the transaction in question, and hence, in such a case, he cannot recover for loss of profits.”

8 R. C. L., page 503, Sec. 62, note 4.

The property involved in this case consisted of hydraulic pipe and mining equipment; something that could be bought on the open market every day of the year, and as appears from the pleadings and not controverted anywhere, plaintiffs had this pipe in their possession two years before they sold it; the defendant knew where it was all of this time but made no effort to reclaim it, nor did he go near plaintiffs during all of said time, but allowed the plaintiffs to sell the same without protest.

It will be remembered that the action was tried by the court in the absence of counsel for either party, but there was no testimony adduced to show

the cost of the property in question; this was alleged in defendant's original answer and counterclaim, to which the Court's attention was often invited; in the motion to strike the pleading; in the demurrer to the later pleadings; showing the invoice price to be \$1,955.00 and the freight to "Supply Point" to be \$1,045.00; a total of \$3,000.00, and applying the most liberal construction to the defendant's case, he should not have been allowed to recover more than that amount.

The measure of damages allowed by the Court was the value *to defendant* of the property. We contend that this property cannot come under that class of property having a peculiar value to the party; such as heirlooms, documents, maps, plans, oil paintings, family portraits, etc., and in speaking of the rule governing these cases, it is said:

"The measure of damages for the loss of destruction of this class of property which has no market value has been stated to be its reasonable worth, WHICH IS ACTUALLY BASED UPON THE COST OF ITS REPRODUCTION; if not, then its actual value to the owner, taking into account its cost and other considerations which affect its value to the owner, WHICH MUST NOT BE ANY FANCIFUL PRICE which he might, for special reasons place upon it."

Note to Southern Express Co. vs. Owens, 8 L. R. A. (N. S.) 369; also, see, Southern Express Co. vs. Owens, 8 L. R. A. (N. S.) 375, 376;

Doyle vs. Eccles, 17 U. C. C. P. 644;
 Adams Express Co. vs. Hoeing, 9 Ky. L. R.
 814;
 Mather vs. Amer. Exp. Co., 138, Mass. 55; 52
 Am. Rep. 258;
 Green vs. Boston & L. R. Co., 128, Mass. 221;
 35 Am. Rep. 370;
 Louisville & N. R. Co. vs. Stewart, 78 Miss.
 600, 29 So. 394;

all of the above cases being actions in tort, and involving the loss or destruction of the class of property last above mentioned.

The foregoing argument is based upon the assumption that the plaintiffs were wrongdoers, but they earnestly contend they were not wrongdoers; it is true, they took possession of the defendant's pipe; it is true they eventually sold it, but it is also true that they took it to save it from destruction and loss and to protect their account against the defendant. The reason of their taking of the property has not been considered by the court, nor is the fact that *that* the proceeds of said sale was applied to the credit of the defendant on his account with plaintiffs. The Court has treated the action as one in tort and has allowed the defendant a profit of \$5,000.00 on his property. This is nothing more or less than damages in tort.

It is evident that the Court based the value of the property on the fact that the defendant says he was forced to abandon his mining venture; but even if such was the case (which was denied), then such

damage would be altogether too remote; too uncertain; too speculative to be considered or allowed in this case.

“Anticipated profits cannot be recovered where they are dependent upon uncertain or changing conditions, such as market fluctuations, or the chances of business, or where there is no evidence from which they may be intelligently estimated.”

17 C. J., pages 787, 788, notes 64, 65, 66.

17 C. J., pages 790, 791, notes 73.

To the same effect is

Note V, 52 L. R. A. 42, 43.

8 R. C. L., page 510, Sec. 69.

“Compensation for actual loss sustained is the fundamental principle upon which the allowance of damages is based, and allowance will not be made in an action for breach of contract * * * * upon a calculation of speculative profits.

Medbury vs. N. Y. & E. R. Co., 26 Barb. 564.

ASSIGNMENT OF ERROR No. 9.

The Court erred in finding as a fact, that certain allegations contained in paragraph 2 of said Findings of Fact, commencing on line 34 of page 3 thereof and continuing as follows to the end of said findings, to wit:

“and he is entitled to counterclaim that amount with interest thereon at 8% per annum from Sept. 1, 1921, as against the debt owing by him to the plaintiffs.”

for the reason that such damages sound in tort and are not a proper counterclaim to the plaintiff's complaint under the laws of Alaska.

The argument heretofore advanced is also submitted with regard to this assignment of error; it is further submitted that as the tort was not waived until the filing of the defendant's answer and counterclaim in this action, there was no implied promise to pay anything until that time, and therefore no interest could commence to run before the time of such waiver; such interest, if any, should date, if at all, from the time of the election and not from the time of the alleged conversion.

Dougherty vs. Chapman, 29 Mo. App. 233.

And if the Court considers interest from the time of the conversion, it is further proof that he considered and treated the action as one in tort and not in contract, and the same is therefore not allowable as a counterclaim in this action under the laws of Alaska.

ASSIGNMENT OF ERROR No. 10.

The Court erred in concluding as a matter of law that the defendant H. W. Reeth is entitled to recover of and from the plaintiffs the sum of \$3,789.79 and the costs and disbursements of this action, for the reason that such conclusion is not warranted by the facts of the case nor the law pertaining thereto, and that such amount is not a proper counterclaim against the plaintiff's complaint, nor did it arise out of the same transaction sued upon by plaintiffs.

The argument advanced in support of assignment of error No. 8 is respectfully submitted in support of this assignment.

ASSIGNMENT OF ERROR No. 11.

The Court erred in overruling plaintiff's objections to said conclusions of law as set forth in paragraph 3 of plaintiff's objections to the defendant's proposed findings of fact and conclusions of law, as follows:

"3.—Plaintiffs object and except to the proposed conclusions of law for the reason that the said conclusion is not law, and is without basis or warrant in law."

The argument advanced in support of assignment No. 8 is respectfully submitted in support of this assignment of error.

ASSIGNMENT OF ERROR No. 12.

The Court erred in refusing to allow and adopt paragraph 1 of plaintiff's proposed conclusions of law, as follows:

"1.—That the defendant's alleged counterclaim is not one arising out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim; nor is it one arising on contract, but is purely a right of action in tort, and is not allowable as a counterclaim under section 896 of the compiled laws of Alaska."

for the reason that such proposed conclusion is the proper law governing this action and should have been adopted by the Court.

A perusal of the counterclaim itself must show that it sounds in tort and not in contract; notwithstanding the tort is expressly waived by the pleader, the wrong complained of is set out in most vigorous language, and the damages claimed and demanded are even more than in the ordinary action of conversion. He SAYS he waives the tort, but he does NOT waive it, and the allegations of the pleader, taken and construed together, show conclusively that his pleading is in tort and not a proper subject of counterclaim under the Alaska statute. Plaintiff's previous argument herein is respectfully submitted in support of this assignment of error.

ASSIGNMENT OF ERROR No. 13.

The Court erred in refusing to adopt and allow paragraph 2 of plaintiff's proposed conclusions of law, as follows:

"2.—That taking into consideration the plaintiff's 28 causes of action and the credit set forth in plaintiff's reply, together with interest thereon, there is now due and owing from the defendant to the plaintiffs the sum of \$8190.21, and that the plaintiffs are entitled to judgment against the defendant for said sum, and for their costs and disbursements in this action."

for the reason that such conclusion of law is borne out by the pleadings and the evidence and is the proper law governing the case.

Plaintiff's twenty-eight causes of action are fully admitted by the answer of the defendant, and his counterclaim is not one contemplated by the Alaska statute; therefore plaintiffs should have judgment against the defendant according to the prayer of their complaint.

ASSIGNMENT OF ERROR No. 14.

The Court erred in giving and entering judgment in this action against plaintiffs, for the reason that the facts alleged in plaintiff's complaint are admitted by the defendant; that the counterclaim set out in the defendant's second amended answer and counterclaim sound in tort, that such counterclaim did not arise out of the same transaction sued upon as the basis of plaintiff's claim, nor is it one arising in contract, and is not a proper subject of counterclaim under the laws of Alaska.

The argument hereinbefore submitted in support of the former assignments of error, is respectfully submitted in support of this assignment of error.

ASSIGNMENT OF ERROR No. 15.

The Court erred in overruling plaintiff's motion for a new trial, for the reason that the pleadings in said action and the evidence adduced thereon and admitted by the Court to sustain the counterclaim of the defendant, "was not sufficient to justify a judgment in favor of the defendant, and that such judgment was erroneous in law, as well as in fact."

Plaintiffs earnestly contend that there has been a great miscarriage of justice in this case; they have been treated as wrongdoers of the worst type. Of course, the motive of a defendant in a tort action is usually not considered in the matter of damages, except as to maliciousness. There is practically no dispute as to the facts of the case. It is admitted by the defendant that he owed the plaintiffs the amounts alleged in the complaint; it is admitted by the plaintiffs that they took into their possession the pipe and equipment belonging to the defendant, and that after keeping it two years, they sold it and applied the proceeds of the sale to the account of the defendant. They admit that they received \$550.00 for the property. They allege and it is not denied that they informed the defendant when they took possession of the property and why they did so. The defendant does not deny or controvert these facts, and the Court has not considered them. Notwithstanding, the defendant in his pleading says he waives the tort and elects to rely upon the implied contract for the value of the goods, he pleads the tort and asks damages for the unlawful taking. He does not ask for the market value, but lays a foundation in his pleading to show damage on account of his having to abandon his mining venture, and the Court has followed his lead, has considered and treated the action as in tort, and knowing from the original answer filed in the case which was referred to time and again in the arguments on demurrer, the true cost of the goods, still allows the

defendant the sum of five thousand dollars above such cost, why?, it must be as damages; speculative damages, far and away above the price of the property. Can anything be more certain or conceivable than that the Court has considered the action as one in tort. He has adopted a rule of damages applicable in actions of tort but not in contract.

Plaintiffs respectfully contend that it is not enough that the defendant should say that he waives the tort and elects to rely upon the implied contract created by the law to recover the value of the goods, he must plead in good faith, for the price of the goods, or for what the tort-feasor received for them. Instead of which he pleads an action in tort; lays the foundation for damages in tort, and claims damages in tort. The pleading, taken as a whole must, notwithstanding his waiver, be considered as a pleading in tort, and as such is not allowable as a counterclaim under our statute. It should not have been allowed to stand as a counterclaim in this action, and the plaintiffs should have been awarded judgment as prayed for in their complaint.

Plaintiffs have suffered great injustice by this judgment and respectfully ask that the same be reversed. No record of evidence has been submitted as we think the pleadings themselves, the Court's findings of fact, conclusions of law and judgment show for themselves that the Court has considered

and treated the action under the rules governing actions in tort and not in contract.

All of which is respectfully submitted.

GEO. W. ALBRECHT.

GEO. W. ALBRECHT.

CHAS. E. TAYLOR.

CHAS. E. TAYLOR.

ALBRECHT & TAYLOR,

Attorneys for Plaintiffs and Appellants.

Due service of the foregoing brief, by receipt of a copy thereof is hereby acknowledged this thirtieth day of April, A. D. 1929.

LOUIS K. PRATT,

Attorney for Appellee.

United States ²¹
Circuit Court of Appeals
For the Ninth Circuit.

JOHN W. FELDER, MAURICE A. GALE,
GEORGE SCHMIDT AND ROBERT
GIERKE, Copartners, Doing Business as
FELDER, GALE AND COMPANY,
Appellants,

vs.

H. W. REETH,
Appellee.

BRIEF ON BEHALF OF APPELLEE.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE TERRITORY OF ALASKA, FOURTH DIVISION.

FILED

JUN 4 - 1929

PAUL P. O'BRIEN,
CLERK

LOUIS K. PRATT,
Attorney for Appellee.

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No. 5718.

United States
Circuit Court of Appeals

For the Ninth Circuit.

JOHN W. FELDER, MAURICE A. GALE,
GEORGE SCHMIDT and ROBERT GI-
ERKE, Copartners, Doing Business as
FELDER, GALE AND COMPANY,
Appellants,

vs.

H. W. REETH,

Appellee.

BRIEF ON BEHALF OF APPELLEE.

STATEMENT OF THE CASE.

This action was commenced at Flat in the Fourth Judicial Division where the issues were partially made up and completed later at Fairbanks. The trial took place at Bethel in the absence of the attorneys for either party, and afterwards it was argued at Fairbanks where Findings of Fact and Conclusions of Law were signed August 29, 1928, and Judgment on the Findings entered of record October 10, 1928. The case was tried upon the Com-

plaint (Record, p. 1), Second Amended Answer and Counterclaim (Record, p. 56) and Reply (Record, p. 65).

The contention of Appellants at all stages was that the matter contained in Appellee's Second Amended Answer and Counterclaim (Record, pp. 56-61), sounded in tort and notwithstanding Appellee's waiver of the tort and his election to rely upon implied contract, could not be used as a counterclaim under Sec. 896 of the Compiled Laws of Alaska.

ARGUMENT.

I.

Where an Answer and Counterclaim has Been Stricken Out Either on Motion or Demurrer, It is No Longer a Part of the Record in the Case and cannot be Used to Test the Correctness of the Court's Ruling on a Demurrer to a Second Amended Answer and Counterclaim.

Appellants demurred to Appellee's Answer and Counterclaim (Record, p. 55), was sustained (Record, p. 56), and his Amended Answer and Counterclaim, was successfully attacked by motion, and on August 20, 1924, he filed his Second Amended Answer and Counterclaim (Record, p. 56), against which Appellants moved to strike and demurred unsuccessfully (Record, pp. 62-64). Appellants replied thereto and the issues were closed. (Record, p. 65).

Appellee's original Answer and Counterclaim (Record, p. 48), having been put out of the case

by Appellants' Demurrer, was and is no longer a part of the record and should not have appeared therein, and cannot be used by a reviewing court to in any manner influence its decision upon the question of the propriety of the trial court's ruling on the Demurrer to the Second Amended Answer and Counterclaim (Record, pp. 64, 65). Appellants' principal Assignment of Error is based upon this last-mentioned ruling. The Supreme Court of Oklahoma in *Owens vs. State*, 271 Pac. 938, 943, Col. 2, discusses this question of practice and say:

“Counsel for plaintiff devote a considerable space in their brief to the nature of the original and first amended cross-petition of the defendant. In fact, Counsel's contention that the cross-petition was an action in tort seems to be based wholly upon these discarded pleadings. It is settled law that, where an amended pleading is filed as a substitute for the other pleading or filed without especially adopting the original pleading, the allegations of the prior pleading, except as repeated in the amended pleading, are wholly abandoned and no reference whatever can be made to the original pleading in determining whether or not a demurrer should be sustained to the pleading in its amended form.”

The Oregon Supreme Court has held the same in *Wells vs. Applegate* (Ore.), 6 Pac. 770, 771:

“The pleadings on which the parties went to trial became the sole pleadings in the case, as

if no others ever existed. By filing the new answer the former answer was in effect withdrawn, and all motions and demurrers relating to it accompanied it.”

II.

Where Personal Property is Wrongfully Taken and Converted, the Injured Party may Waive the Tort and Rely on an Implied Contract, Raised by the Law Itself, and can Use It Either as a Cause of Action in a Complaint or as a Defense by Way of Counterclaim; and, When so Used, the Measure of Damages is Determined upon the Same Legal Principles as in the Instance of any Other Breach of Contract.

Appellants seek to reverse the Judgment of the lower court for what they claim was its erroneous view of the scope and purpose of our law on the subject of counterclaims, found in the Alaska Code of Civil Procedure, Section 896, which reads:

“The counterclaim mentioned in the last preceding section must be one existing in favor of the defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of the following causes of action:

First. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim. Second. In an action arising on contract, any other cause of action arising also on contract,

and existing at the commencement of the action.

The defendant may set forth by answer as many defenses and counterclaims as he may have. They shall each be separately stated and refer to the causes of action, which they are intended to answer in such manner that they may be intelligibly distinguished.”

This section of our code is a combination of common law counterclaim and set-off, the first subdivision covering counterclaim and the second set-off. Appellee’s Second Amended Answer and Counterclaim (Record, p. 56), was framed to meet the requirements of the second subdivision, that is, set-off, by waiving the tort involved in the taking of his hydraulic plant and founding his right to counterclaim upon the theory of implied contract. However, the reply disclosed to Appellee and his attorney a state of facts that would bring his counterclaim within the first subdivision and constitute it “a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of plaintiffs’ claim.” This latter phase will be discussed in a subsequent part of this brief.

III.

There was no Bill of Exceptions made and necessarily this Court will have to rely upon the Complaint, Second Amended Answer and Counterclaim, Reply, Findings of Fact and Conclusions of Law, and Judgment. The first Finding of Fact (Record, p. 75), finds generally,

“that the allegations contained in the first four paragraphs of the defendant’s Second Amended Answer and Counterclaim were true”

and the Second Finding (Record, p. 78), specifically finds that:

“he was entitled to counterclaim the value of the machinery taken from him”

which taken together amount to a finding that Appellee had in fact elected to waive the tort involved in the taking of his property and rely upon the implied contract raised by the law that Appellants would pay him therefor. Upon the question of the significance of general findings, I desire to quote from the case of *Magurin vs. Stefanich et ux.* (Calif.), 272 Pac. 774, col. 1:

“While there is no specific finding covering this allegation, there is a blanket finding, 8, ‘that all the allegations contained in the Answer of the defendants are true.’ This is a sufficient finding that the relation of attorney and client existed at the time of the negotiations alleged in the answer.”

The Trial Court epitomized the issues in the case and the evidence in support in its second Finding of Fact (Record, p. 76), which reads:

“That prior to August, 1921, the defendant became the owner by location and purchase of contiguous placer mining claims of an area of about 1200 acres, located at Golden Gate Falls, on the Riglugalic River, a tributary of the Kuskokwin river, in the said Division and Territory,

and up to that time had prepared the same for hydraulic mining by the construction of cabins, machine shop and other buildings, digging ditches, placing a dam across the said river and clearing the ground of brush and was ready to commence open cut hydraulic mining thereon. That in 1919 the defendant purchased in San Francisco, California, a hydraulic mining plant, consisting of (describing the different articles), and in the summer of 1920 caused the same to be shipped from San Francisco, California, to Bethel, Alaska, and from there it was started for his mining ground at Golden Gate Falls on said Riglugalic River, but owing to high water the boat transporting the same was unable, by reason of the swift current, to get farther than a point called 'Supply Camp' on the said river, which is about forty miles down river from the said Golden Gate Falls, and at that point the said machinery was taken from the boat and put on the bank and placed under a tent and in charge of a native Indian. That in August, 1921, the plaintiffs employed one Tony Sumi to proceed with a power boat from Bethel to the said Supply Camp on the Riglugalic River and load the said machinery thereon and return it to Bethel, which the said Tony Sumi did and delivered the same to these plaintiffs who afterwards sold the same and kept the proceeds. That the action of the plaintiffs in taking the said machinery and disposing of it was without the knowledge or

consent of the defendant, was unlawful, unjustifiable and oppressive and resulted in compelling the defendant to abandon his mining enterprise at Golden Gate Falls. That under the circumstances and conditions as they existed at that time and by reason of the fact that there was no market value for said machinery at that time and place, and by reason of the use that the defendant could have put it to, the said machinery was worth to him the sum of \$8000.00 and he is entitled to counterclaim that amount with interest thereon at eight per cent per annum from September 1, 1921, aggregating \$12,480.00, as against the debt owing by him to the plaintiffs."

In the absence of a Bill of Exceptions preserving the evidence, this Court is bound to assume that the testimony heard by the court warranted it in making this Finding of Fact, and the only thing that remains is to apply the law arising thereon upon the two questions of waiving a tort and depending on implied contract and the principles of law upon which the value of property should be estimated.

IV.

It is settled law that where one's personal property is wrongfully taken from him and converted by another, he may waive the tort involved in the transaction and sue for and recover the value of the property as upon an implied contract. The Oregon Supreme Court passed upon this question in

the early case of *Miller vs. Hirschberg*, 40 Pac. 506, using this language at page 510, col. 1,

“Under some circumstances a plaintiff may waive a tort and sue in contract, but he is not compelled to do so. The defendant, having received, and wrongfully converted to his own use, property in which Bentley had both a right of property and right of possession, cannot insist that he shall waive the tort and sue in *assumpsit* for its value. He was entitled to adopt the form of action he preferred and having elected to proceed in tort is entitled, after judgment, to have the findings of court construed to support the judgment, if it can be done without violating well-settled rules of law.”

That Court again expressed itself upon this subject in the case of *Casner vs. Hoskins* (Ore.), 128 Pac., paragraph 12 of the syllabus on page 841 reads:

“Where plaintiff wrongfully took possession of a railroad constructed by defendant, defendant might waive the tort and upon sale by plaintiff treat him as his agent and recover in *assumpsit* the purchase price, or, under the broader American rule, waive the tort and bring an action for the value of the road, and hence may, under L. O. L., Sec. 74, Subdivisions 2, 3, providing that in an action on contract any other cause of action on contract may be pleaded as a counterclaim, plead the taking

of the road as a counterclaim in an action on a promissory note."

In the opinion at page 847, col. 2, this commentary is made:

"The principle thus announced is known as the English doctrine which probably prevails in the greater part of the United States. A more liberal rule, however, has been adopted in many of the states where, the conversion having been waived, the wrongdoer can be sued as for property sold and delivered, whether or not he has disposed of it, and the value of which may be recovered in an action instituted for that purpose. 7 Ency. Pl. & Pr. 369. The legal principle last asserted is not founded upon the precept of ratification, and if property has been sold by the tort-feasor for less than its value, unless the owner with full knowledge of the facts relating to the entire transaction accepts the proceeds or a part thereof, he does not, by waiving the tort and bringing an action for the value of the goods, confirm the act, and is not bound by the conduct of the wrongdoer, except so far as mere conversion is concerned."

The Oklahoma Supreme Court considered this question exhaustively in the case of *Owens vs. State ex rel. Mothersead*, 271 Pac. 938. That court utterly repudiates the English rule followed in a number of states that the recovery should be limited to the amount received by the wrongdoer upon a

resale, and upholds the doctrine of the Oregon court, that the rule of damages would be the market price, if there was any; in a word that the rule would be the same as in any other case of damages for breach of contract. The court expressed itself upon this phase at page 942, col. 2, in this language:

“It appears to us to be elementary that a suit for compensation, based on a transaction involving what is in law a sale, and that operates to transfer a title to property, where it is not sought to have the specific property returned to its owner, the measure of damage is the value of the property so taken and appropriated. Any other rule would be inconsistent with the fundamental law of damages, as the same relates to the law of contracts. The rule is stated in 17 Corpus Juris, 852, par. 168, as follows: ‘Where a tort is waived and an action is brought in contract, the measure of damage is governed by the rule applicable to actions in contract.’ Plaintiff contends that, in case of a waiver of the tort, the measure of damage is not the value of the property taken, but it is the benefit resulting or accruing to the wrongdoers estate. With this, in its unqualified or unrestricted sense, we cannot agree. However, when not attempting to state a fixed or exclusive rule, it may be said in a general way that the law will, at the election of the party injured, imply or presume a contract on the part of the wrongdoer to pay to the injured party the full value

of the benefits resulting to such wrongdoer. Farmers' & Merchants' National Bank of Hobart vs. Huckaby, *supra*. This rule is not necessarily objectionable, when applied to a great number, or perhaps a majority, of the cases, when it does not attempt to set forth a rule of independent application to measure the damage in an action based upon an implied contract. The rule is not primary or independent and must bear the qualification that, in determining the value resulting to the estate, the value of the property wrongfully taken is the 'yardstick,' and when the one, the value of the property, is determined, the other, the benefit to the estate, logically follows. For all practical purposes it may be said that the rules are reciprocal; that is, there is a conclusive legal presumption that the value resulting to the estate of the wrongdoer is equal to and equivalent to the actual value of the property taken by the wrongdoer."

These excerpts fully meet the argument and authorities in Appellants' brief that the measure of Appellee's damage should have been confined to the amount actually realized by Appellants when they sold Appellee's hydraulic plant. While it is true the English doctrine referred to and applied in many of the different states, would confine the injured party to a recovery of the amount which the wrongdoer received for the converted property, yet that obviously unjust rule has been condemned

by the Oregon and Oklahoma Supreme Courts and many others.

There is, however, nothing in this record from which this court may know how much Appellants received from the sale of Appellee's hydraulic plant. It is stated in the Reply that Appellants got \$550.00 for part of it and that is repeated in the brief, but the evidence is not before this court by Bill of Exceptions and the Findings of Fact and Conclusions of Law make no reference to that matter. So, as the case stands, this court in order to uphold the Findings of Fact and Conclusions of Law and Judgment, will be inclined to assume and presume that they got a sum for the entire plant equal to or greater than the amount fixed by the court as its value, to wit; \$8,000.00.

The attorneys for Appellants in their brief contend that it is impossible for Appellee, upon the allegations of fact contained in his Second Amended Answer and Counterclaim, by any known system of ratiocination, to waive the tort involved in the taking of his hydraulic plant and found his counterclaim upon implied contract. They reach this conclusion because there is language used in the Second Amended Answer and Counterclaim and also in the Findings, appropriate as a basis for damages for tort, but this overlooks the fact that there is other language therein, which emphasizes the attitude assumed by Appellee and makes it manifest that he intended to, and has, in fact, waived the tortious taking of his property and chose to rely on the breach of an implied contract. The trial court so

construed the Second Amended Answer and Counterclaim and applied the evidence thereto accordingly.

The language in Appellee's pleading applicable in an action for damages for tort could be and, no doubt, was, either ignored as surplusage by the Court, or considered along with other matters as bearing upon the proper test to be applied in fixing a value on the property wrongfully converted; that is, it might properly influence the Court, in a sense, in adopting the test that it did, to wit; the value of the hydraulic plant to Appellee at the time and place of conversion.

V.

Where Personal Property is Wrongfully Converted and the Owner Elects to Waive the Tort and Sue for Its Value, and the Property has No Market Value at the Time and Place of the Taking, the Proper Test is the Worth to the Owner Under All the Circumstances Existing at the Time and Place of Conversion.

The Court in the second Finding of Fact (Record, p. 76), found that Appellee owned about 1,200 acres of placer mining ground at Golden Gate Falls on the Riglugalic River, which he had prepared for hydraulic mining and to that end had ordered a hydraulic plant and shipped it from San Francisco, California, to Bethel; that it arrived at Bethel in the summer of 1920 and was started up the Kuskokwin and Riglugalic Rivers for his ground at

Golden Gate Falls, but owing to high water in the Riglugalic River, it had to be unloaded at a point which he called "Supply Camp," where it was placed under a tent in the charge of an Indian; that in August, 1921, Appellants wrongfully took said hydraulic plant from Supply Camp and removed it to Bethel, and afterwards sold it and kept the proceeds; that this resulted in compelling Appellee to abandon his mining enterprise at Golden Gate Falls; that at the time and place of the taking, there was no market value for the said property. On this state of facts the Trial Court fixed the value of the machinery at what it was worth to Appellee under the circumstances and conditions as they then existed and in that was clearly justified both in law and morals.

This question received attention by the Supreme Court of Oregon in the case of *Swank vs. Elwart* (Ore.), 105 Pac. 901. Paragraph 11 of the syllabus on page 902 states the rule as to the measure of damages, where there is no market value, as follows:

"As a general rule, the measure of damages for conversion is the market value of the property at the time and place of the conversion, if it has such value, but if it has no market value at the time and place of conversion, and it is more particularly valuable to the owner than anyone else, then it may be estimated with reference to its value to him; but, before resort may be had to such method of establishing value, it must be affirmatively shown that there is no market value."

In the opinion at page 906, col. 2, this language appears:

“But if the property has no market value at the time and place of conversion, either because of its limited production, or because it is of such a nature that there can be no general demand for it, and it is more particularly valuable to the owner than anyone else, then it may be estimated with reference to its value to him. Before resort may be had to such method of establishing value, it must be affirmatively shown that there is no market value.” 4 Sutherland on Damages, Sec. 1117.

VI.

By Their Reply Appellants have Estopped Themselves from Raising Any Question as to the Validity of Appellee's Counterclaim.

In paragraphs 1 to 7, inclusive, of the Reply (Record, pp. 67-71), Appellants make the following statements in substance:

“That in 1919 they were merchants at Bethel and Appellee was engaged in mining at Golden Gate Falls on the Riglugalic River; that he applied to them for credit in the way of provisions, mining supplies, and the taking up of checks that he might issue to workmen and others in connection with his mining operations and represented to them that he had valuable mining ground at Golden Gate Falls which he was desirous of working and that he was about to send outside and have shipped in a

good and sufficient hydraulic plant and equipment to enable him successfully operate the ground and that he had available funds in the Scandinavian-American Bank at Seattle, Washington, and that appellants would run no risk in extending him credit as his property was ample security to them; that believing such representations to be true, appellants advanced the credit asked for by Appellee; that in 1920 the hydraulic plant mentioned by Appellee was shipped to him from San Francisco, California, and arrived at Bethel and when it got there Appellants *consented* that Appellee might move it up the Kuskokwin and Riglugalic rivers to his mining ground at Golden Gate Falls and that Appellee started to move the machinery but cached it on the bank of the Riglugalic river at a point that he called 'Supply Camp'; that in the fall of 1921 Appellants were informed that the said machinery was about to be washed into the Riglugalic river and lost and considering that that was all the security they had for their advances, sent a power boat up from Bethel and had the hydraulic plant removed to Bethel, at which time they notified Appellee of what they had done and informed him that if he would pay them the amount he owed and also the expense of removing the plant from Supply Camp to Bethel, he could have the machinery; that afterwards Appellants sold a part of the plant for \$550.00 to Al Walsh; that the balance of the plant had been

attached by the U. S. Marshal under a writ issued in their action.”

From this it appears that Appellee offered his mining ground and hydraulic plant as security for the advancements he wished Appellants to make and that they, relying thereon, delivered merchandise, cashed his checks and *consented* and *permitted* him to move the plant from Bethel to Supply Camp and that they believing they had some kind of an equitable lien on the hydraulic plant for their advances, took it into their possession without the knowledge or consent of Appellee and afterwards disposed of it, or at least a part of it. This involves the hydraulic plant, its purchase and transportation to Supply Camp and the conversion thereof by Appellants, with the original contract and transaction whereby Appellants advanced credit to Appellee and which is made the subject matter of the twenty-eight causes of action in the complaint.

Appellants would seem to think from what is said in the Reply that Appellee made a mistake in founding his counterclaim upon the theory of set-off and should have based it upon the first subdivision of Section 896; that is to say, his counterclaim ought to have been asserted as constituting “a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of plaintiff’s claim.”

This should estop Appellants from raising any question touching the validity of Appellee’s counterclaim.

VII.

Conclusion.

The disquisitions in Appellants' brief on the subject of counterclaims under Section 896, Compiled Laws of Alaska, and the correct rule by which to fix the value of personal property wrongfully converted, where the injured party waives the tort and chooses to rest his right upon implied contract, are so fine and volatile that, if shot through the bill of a humming-bird into the eye of a gnat, wouldn't make the gnat wink. If Justice has caught up with Appellants in this instance, they have no one to blame but themselves. Their conduct was high-handed and exhibited scant respect for the property rights of Appellee. The Findings and Judgment of the Trial Court were amply justified by the pleadings and evidence.

Respectfully submitted,

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Attorney for Appellee.

Copy of the foregoing Brief on Behalf of Appellee received this 18 day of May, 1929.

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